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No. 89-

# In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD M. DRAY,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

The questions presented are:

1. In petitioner's second trial for conspiracy to commit mail fraud, after he had successfully appealed his previous conviction,

a. Whether, when the trial judge had ordered petitioner acquitted because of insufficiency of evidence of mailing upon three substantive counts of mail fraud at his earlier trial for mail fraud and conspiracy to commit mail fraud, the government was collaterally estopped from introducing as evidence of essential elements of the offense for which he was being prosecuted, three documents specifically pleaded in, and introduced to prove, the three counts of mail fraud upon which he had been acquitted;

b. Whether, when the jury had acquitted petitioner upon the two remaining substantive counts of mail fraud at his earlier trial for mail fraud and conspiracy to commit mail fraud, the government was collaterally estopped from introducing as evidence of essential elements of the offense for which he was being prosecuted, two documents specifically pleaded in, and introduced to prove, the two remaining counts of mail fraud upon which he had been acquitted, as well as two closely related documents.

2. Whether, upon introduction in evidence of seven documents, as to each of which the application of collateral estoppel was claimed, upon the basis of their being evidence of conduct for which petitioner had been acquitted, when petitioner's claim of collateral estoppel was denied and the documents were introduced in evidence, the purpose for which the documents were introduced should have been restricted and the jury so instructed, upon petitioner's request, at the time of introduction, at the trial judge's charge conference, and following the charge, before the jury's retirement.

3. Whether the standard of review of the denial of limiting instructions is, under Rule 105, Federal Rules of Evidence, solely for abuse of discretion.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner Richard M. Dray respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on March 28, 1990.

## OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit has not yet been reported. It is reprinted in the appendix hereto, pp. 1a-26a, *infra*.

The memorandum and order of the United States District Court for the District of Massachusetts (Mazzone, D.J.) has not been reported. It is reprinted, in the appendix hereto, pp. 30a-34a, *infra*.

## Jurisdiction

Jurisdiction of the District Court of Massachusetts, in which petitioner was originally indicted for offenses against 18 U.S.C. §371 and 18 U.S.C. §1341, was under 18 U.S.C. §3231.

Upon petitioner's appeal to the Court of Appeals for the First Circuit from his conviction of violation of 18 U.S.C. §371, the First Circuit on March 28, 1990, entered judgment and an opinion which affirmed the conviction. Rehearing was not sought.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

## Constitutional Provision, Statutes, and Rule Involved

### *Constitutional Provision*

UNITED STATES CONSTITUTION. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Statutes*

18 U.S.C. §371 *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1341 *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(Before amendment by P.L. 101-73 and addition of 18 U.S.C. §1346 to Chapter 63 by P.L. 100-690.)

*Rule*

*Federal Rule of Evidence 105. Limited Admissibility*

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for

another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

## Statement of the Case

Original jurisdiction of the District Court for the District of Massachusetts of the offenses charged here was under 18 U.S.C. §3231.

### a. *The Original Indictment*

Petitioner was tried and convicted twice for conspiracy to commit mail fraud under 18 U.S.C. §§371 and 1341. His first conviction was vacated and remanded under the authority of *McNally* v. *United States*, 483 U.S. 350 (1987). *United States* v. *Ochs*, 842 F.2d 515 (1 Cir., 1988). At his first trial, he was ordered acquitted by the trial judge on three accompanying substantive counts of mail fraud and by the jury on two other accompanying substantive counts of mail fraud. Thus, his second trial was only on the one conspiracy count of the original six count indictment.[1] It is from the affirmance by the First Circuit of his conviction for conspiracy that he now seeks certiorari.

The factual allegations of Count One, for conspiracy, which Count contained within it the alleged part played in the "scheme" by the mailings alleged in Counts Two through Six inclusive, were, so far as material hereto, centered around two alleged, related sets of dealings by petitioner and his co-defendant, Paul Ochs, Jr. (hereinafter sometimes called "Ochs").

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[1] The original indictment is set forth in the Appendix. (p. 28a, *infra*) In the redacted version for the second trial, besides the deletion of Counts Two through Six, there were also deleted subparagraph 14(b), which alleged deprivation of "intangible rights," and subparagraphs 21(b) and 21(e), which alleged as overt acts the mailings also alleged in Counts Two and Three, upon which petitioner and Ochs were acquitted by the first trial judge.

The first set was with Ochs's principals, Temple Place Associates (hereinafter sometimes called "TPA"), in a renovation project in downtown Boston, petitioner being the attorney for Ochs and his principals, for the purpose of obtaining City of Boston approval and permits, as well as with the construction manager and general contractor on the project, Mirabassi and Associates.

The second was with an employee of the Department of Inspectional Services of the City of Boston, (hereinafter sometimes called the "City"), who had authority to approve the estimated cost of work to be done, in order to determine the fee to be paid the City for the building permit which would authorize the work to be done.

It was alleged that petitioner, as a part of the conspiracy would make a "cash payoff" to the employee, in order to obtain his approval of a false estimated cost of $1,200,000.00, which would result in a permit fee of approximately $12,000, when the estimated cost should have been at least $2,400,000, which would have resulted in a permit fee of approximately $24,000.

It was further alleged that TPA would be billed $125 per hour for petitioner's work in obtaining the permit and Mirabassi and Associates would be billed $5,975 for the same work, which amount petitioner and Ochs would share.

To accomplish the object of the conspiracy — "to obtain money for the defendants Dray and Ochs, which was not due them" — petitioner and Ochs, according to the allegations, defrauded the City and its citizens of $12,000.00 in the additional permit fees which should have been paid and defrauded Mirabassi and Associates and TPA, "who were double billed for the same purported legal services performed by Dray in connection with his filing of the building permit application."

Substantive Counts Two, Three, and Four of the original indictment, which, as did Count Five and Six, incorporated all of the foregoing factual allegations, alleged mailings by petitioner and Ochs from Boston, Massachusetts to one

Williston (sic in indictment) Smith, in Philadelphia, Pennsylvania, of a letter from Ochs with an attached letter from petitioner on or about May 22, 1984, of petitioner's bill dated May 29, 1984, on or about June, 1984, and of a letter from petitioner to Ochs, on or about April 8, 1985. Counts Five and Six alleged receipt of, and knowingly causing to be delivered, by petitioner and Ochs, a check for $1,687.50, on or about June 11, 1984, and a check for $30,000.00, on or about May 23, 1985.[2]

Trial of both defendants proceeded[3] and, upon the government's resting on the ninth day, the first trial judge (Woodlock, D.J.) ordered judgments of acquittal on Counts Two, Three, and Five. "The directed verdicts were explicitly based on insufficient evidence of mailing. . . ." *United States* v. *Ochs*, 842 F.2d 515, 519, n.5 (1 Cir., 1988)

During jury deliberations upon the remaining counts, One, Four, and Six, the jury asked a question:

> "Point of clarification on point of law. Could we please have clarification. If it's established that defendant A is guilty of conspiracy by way of mail fraud and that it is established that defendant B was part of that conspiracy but not definitely part of the mail fraud itself, is defendant B in fact guilty of the conspiracy (mail fraud)?" First trial transcript, Vol. 11; 2, 10

In answer to the question, Judge Woodlock instructed in part:

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[2] The First Circuit's opinion (p. 20a) contains an appendix setting forth a summary of the content of each document, pleaded in each substantive count of the original indictment, keyed to those count numbers, and the exhibit numbers at each trial. The exhibits at issue, numbered as they were at the second trial, are reproduced in the Appendix, *infra*, pp. 39a-51a.

[3] Since the evidence at petitioner's second trial did not vary in material respects from that at the first, (See First Circuit's opinion, p. 6a, *infra*) that evidence is summarized *infra*, at 10-13.

> "To warrant conviction under Count I, [conspiracy] the Government must prove beyond a reasonable doubt that the Defendant entered into a conspiracy and in so doing entered into it with the specific intent that the alleged scheme be carried out by use of the mails." First trial transcript, Vol. 11; 11

Explaining "specific intent" to the jury, Judge Woodlock further instructed:

> "... [T]he Government must prove beyond a reasonable doubt that the existence of a conspiracy to commit the offense of mail fraud, that is an agreement to commit the offense of mail fraud, and that the individual Defendant before you, with knowledge of the purpose of that conspiracy, being reasonable and reasonably foreseeing a use of the mails in furtherance of that conspiracy, willfully became a member of a conspiracy itself." (sic; error in transcription?)[4]
>
> . . . . . .
>
> "It's that concept of reasonable foreseeability with respect to the use of the mails that focuses you on the specific intent, the specific intent that's called for in connection with your evaluation." First trial transcript, Vol. 11; 11-12

After further deliberations, the jury acquitted petitioner and Ochs on the remaining substantive counts, Four and Six, and found each guilty on Count One, alleging conspiracy.

b. *The attempted invocation of collateral estoppel and the request for limiting instructions.*

Petitioner, before his and Ochs's trial on the redacted indictment for conspiracy, filed a motion in limine, amended before

[4] *Semble* "became a member of *the* conspiracy *himself*."

and during trial to include all documents referred to by the First Circuit in the appendix to its opinion, (p. 20a, *infra*). By the motion, on grounds of collateral estoppel, he sought to exclude first trial Exhibits 13 through 19 inclusive, as well as any evidence of mailing of the foregoing documents. With two exceptions, Exhibits 16 and 18, which were closely related, each one of the succession of documents had been specifically pleaded in each of Counts Two through Six inclusive, upon which petitioner had been acquitted.

In his memorandum and order denying petitioner's motion (pp. 21a, 24a-27a, *infra*), the second trial judge stated petitioner's (and Ochs's) position.

> "[T]he government, having failed to prove in the first trial that the mails were used in connection with the scheme to defraud on the substantive mail fraud counts, may not be allowed to use the same evidence to show, in the single surviving conspiracy prosecution, that the use of the mails was reasonably foreseeable." (pp. 30a-31a, *infra*).

The issue having been so framed, the judge's reasoning in denying petitioner's motion (pp. 24a-27a, *infra*) foreshadowed the reasoning of the First Circuit in rejecting petitioner's collateral estoppel claim.

Petitioner's motion in limine having been denied, he submitted, immediately before commencement of the second trial, a request for limiting instructions to be given as to each of the five documents[5] pleaded in first trial Counts Two through Six (pp. 35a-37a, *infra*) and renewed the request at the points when each of the five documents, as well as the two related documents, were introduced in evidence. Finally, he renewed the request in the charge conference before the judge's charge to the jury and renewed it again thereafter, upon stating his objections before the jury retired.

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[5] *e.g.* "*This* document was alleged. . . ." "I have admitted *this* document . . . ." "You may not consider *this* document. . . ." (pp. 35a-36a)

Whether and how the judge would limit the documents and evidence of their mailing being unclear, petitioner phrased this request in the alternative, with such guidance as was furnished by the trial judge's memorandum and order. (pp. 24a-27a, *infra*)

First, he requested that the jury be instructed as to each document, (1) that it was alleged to have been mailed in violation of the mail fraud statute and that the defendant had been acquitted of the violation, (2) that the document is admitted for no other purpose than on the issue as to whether or not the defendants agreed to devise or attempt to devise a scheme or artifice to defraud, (3) that the document is not to be considered on the issue as to whether the mails were used to carry out the scheme, (4) that the document might not be considered on the issue as to whether it was reasonably foreseeable by either defendant that the mails would be used for the purposes of executing a scheme, and (5) that the document was not placed in the mail, taken or received therefrom, or caused to be delivered by mail.

If that instruction were not to be given, it was requested that as to each document, when introduced in evidence, the jury be instructed, (1) that the document has been admitted for the purpose of showing reasonable foreseeability by either or both defendants that it would be mailed, and (2) that it is for the jury to determine whether each defendant contemplated that the mails would likely be used to transmit the document, and that, in making the determination, the jury may consider whether it finds by a preponderance of the evidence that the mails were in fact used to transmit the document.

When, upon introduction in evidence of Exhibit 32 (first trial exhibit 13), petitioner's request for retainer and $125.00 per hour fee, petitioner requested limitation according to one or the other of the alternatives, the trial judge, in declining, said:

"I think it would be confusing to instruct the jury in the middle of the trial as to what the government has to prove. I am going to give these instructions at the end of the case when everything is in."

c. *The evidence at trial material to consideration of the questions presented.*

The testimony of the four major witnesses for the government, Douglas Robinson, the City of Boston employee, Edwin A. Walkey, a consultant to Mirabassi and Associates, the construction manager and general contractor, David Mirabassi, the principal of Mirabassi and Associates, and J. Willison Smith, assigned on behalf of Temple Place Associates to monitor the construction, was, at the second trial for conspiracy, substantially the same in respects material hereto as their testimony at the first trial, with the possible exception of Smith's testimony as to transmittal of documents by mail or by Federal Express. See *infra*, at 12, 22. See the First Circuit's opinion at p. 6a, *infra*.

*i. Robinson*

Douglas Robinson, who had previously pleaded guilty to perjury and who testified under an immunity grant, had responsibility for reviewing the amounts of building cost estimates. Petitioner told Robinson that he was going to file an application for the building in question and that it was a $2.5 million project. Robinson told petitioner that the amount was excessive, and either he or petitioner said the price on the permit could be lowered. After the petitioner had told Robinson that a person representing the project would receive two thirds of the permit savings from lowering the estimate, petitioner brought in an application, which Robinson initialled for approval, with an estimated cost of $1,200,000.00.

At some later date, petitioner gave Robinson an envelope containing cash "in the vicinity of $400.00 but never gave more."

ii. *Edwin A. Walkey*

Walkey, Mirabassi's consultant, took a building permit application bearing a cost estimate of $2,425,000.00 to Ochs, who signed it as Temple Place Associates's representative. On the same day, Walkey obtained a check for $23,000.00 from the Mirabassi bookkeeper, but was told by petitioner that the estimated cost and the amount of the permit fee were too high, whereupon Walkey obtained a new check for $11,750, which was delivered with the application to the City of Boston cashier.

iii. *David A. Mirabassi*

Mirabassi was introduced to petitioner by Ochs as the person who would be dealing with various approvals and permits from the City of Boston, including putting the building permit through "permit processing." He brought in a check for the permit fee to Walkey on May 25, 1984 and then voided it, having been told by Walkey that petitioner said the amount was too high. He or his bookkeeper gave a new check in the amount of $11,750.00 to Walkey.

Ochs gave Mirabassi petitioner's bill for $5,975.00 for professional services in preparation, filing, and docketing the permit application and told Mirabassi that his company should pay the bill, since the general conditions of his contract with Temple Place Associates included the cost of obtaining the permit.

Mirabassi did not know whether petitioner billed anyone else for services in connection with this building permit application.

None of Exhibits 32 through 38 inclusive (First trial Exhibits 13 through 19; see appendix to First Circuit's opinion (p. 20a, *infra*)) was introduced through Robinson, Walkey, or Mirabassi.

iv. *J. Willison Smith*

Smith was assigned by TPA to oversee the project from early 1984 to the end of 1985. If Smith received something in Philadelphia in 1984, it would be received "[u]sually by mail or Federal Express." Second trial transcript, Vol. 6; 16. He did not, however, recall particular categories of documents being sent by Federal Express from Temple Place Associates in Philadelphia to Stanhope Development Associates in Boston. Second trial transcript, Vol. 6; 20. As to documents received in Philadelphia from Boston, other than the contractor's construction draw requests, Smith recalled no specific documents being received by Federal Express. Second trial transcript, Vol. 6; 17. Smith testified at the first trial that "things" received in Philadelphia were delivered by mail or Federal Express. "The mail between Boston and Philadelphia and back is horrible." First trial transcript, Vol. 4; 7, 8.

Over petitioner's objection on the previously stated collateral estoppel grounds and upon petitioner's pressing his request for limiting instructions as to each document, upon the introduction of each of Exhibits 32 through 38 inclusive, each of the documents which had been the basis of, and pleaded in, the Counts upon which petitioner had been acquitted at the first trial, as well as each of the two related documents, was admitted in evidence through Smith, without restriction as to its purpose.

v. *The bank official's testimony*

Through the testimony of a custodian of records of petitioner's bank, there were introduced a deposit in the amount of petitioner's bill of May 27, 1984, a copy of a check in that amount from Temple Place Associates, a copy of a check of Mirabassi and Associates, in the amount of $5,975.00, deposited on July 3, 1984, a copy of a check in the amount of $3,000.00 from petitioner to Ochs dated July 3, 1984 and

deposited by Ochs on July 10, 1984, and a copy of a check drawn to "cash" in the amount of $600.00 drawn by petitioner on July 9, 1984.

vi. *Other evidence of office practices as to mail or Federal Express*

There was no evidence at the second trial as to petitioner's or Stanhope Development Associate's (Ochs's proprietorship) office practices with respect to the use of mail or Federal Express. At the first trial there was indirect and peripheral evidence introduced through Smith, the TPA representative, but no direct evidence of either petitioner's or Stanhope's office practices. See first trial transcript, Vol. 7; 91-132.

In view of the pejorative characterization of consumption of the "phoenix" at the close of the First Circuit's opinion, (p. 19a, *infra*) petitioner feels obliged to point out that the foregoing summary of the material evidence is of direct testimony in its light most favorable to the government and does not include evidence introduced by petitioner and Ochs, such as expert testimony and other evidence introduced to show that the value of the work was indeed approximately $1,200,000.

d. *The First Circuit's opinion*

In its opinion, (p. 1a, *infra*) the First Circuit, after noting the opinion and holding of this Court in *Dowling* v. *United States*, 110 S.Ct. 668 (1990), stated that "because the prior burglary acquittal did not actually determine an ultimate issue in the bank robbery case, reuse of the evidence was appropriate" and that "*Dowling* signalled that, even as between the same parties, only those issues actually decided in the earlier case are foreclosed from relitigation in a later case." (p. 7a).

The First Circuit then phrased the inquiries: "(1) Has defendant demonstrated that an ultimate issue of fact was actually decided in his favor at the first proceeding? (2) If so, would

defendant be required to relitigate the same issue at the retrial?" (p. 9a).

With respect first to the judicial acquittals on Counts Two, Three, and Five, the First Circuit drew a distinction between the first trial judge's determination "only that there was insufficient evidence from which a jury could conclude beyond a reasonable doubt that the three documents in question . . . had actually been mailed," and the First Circuit's conclusion that "[n]othing in his ruling suggests that [he] believed, or found that mailing was not intended or reasonably foreseeable."[8] (p. 10a, *infra*)

Thus, according to the First Circuit, although the first trial conclusively determined the government's inability to prove that the three documents were actually mailed, the retrial did not compel petitioner to relitigate that issue, since this evidence was used at the second trial to demonstrate the conspiracy and the conspirators' reasonable foreseeability of mailing. "Reintroduction of the three documents and Smith's rehashed testimony as to the parties' usual office practices was proper *for these purposes*" (p. 12a, *infra*) (emphasis supplied).

In its discussion of the judicial acquittals, the First Circuit raised no question as to the conclusiveness of the acquittals' determination of a first trial issue, (p. 12a, *infra*), unlike its reasoning as to the jury's acquittals, which, as findings of fact, were questionable for collateral estoppel purposes because of the jury's concurrent conviction of petitioner for conspiracy. (pp. 13a-14a, *infra*)

As to the jury acquittals on Counts Four and Six, "[t]aking into account the conspiracy conviction," the First Circuit said,

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[8] Although the First Circuit then refers to *United States* v. *Salamone*, 869 F.2d 221 (3d Cir.), *cert. denied*, 110 S.Ct. 246 (1989), petitioner is bound to point out that the earlier denial of certiorari was on Salamone's petition, apparently with regard to a different portion of the opinion, and that, six days after the date of decision in *Dowling*, this Court granted the Government's petition for writ of certiorari and vacated the judgment and remanded the case to the Third Circuit "for further consideration in light of *Dowling* v. *United States*, 493 U.S. ____, 110 S.Ct. 668 (1990)." *United States* v. *Salamone*, 110 S.Ct. 830 (1990).

"it seems highly probable, if not ineluctable, that the original jury found insufficient evidence that the exhibits in question were actually mailed, but sufficient evidence that mailing was contemplated." (p. 13a, *infra*) Although the First Circuit found the first trial jury acquittals on Counts Four and Six to be "simultaneous and facilely reconcilable" with the conspiracy conviction, (p. 13a, *infra*) its opinion quotes from *United States* v. *Citron*, 853 F.2d 1055, 1059 (2d Cir., 1988), in which the Second Circuit's reasoning was based in part on verdict inconsistency, *(ibid.)* to the effect that "'the [conspiracy] conviction casts doubt on whatever factual findings might otherwise be inferred from the related acquittal[s].'" (p. 14a, *infra*).

The First Circuit then addressed the question of the effect on the first trial jury of the first trial judge's instructions, which stemmed from *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). "[T]he instructions were not given on the issue of mailing, but explicated the government's burden as to criminal intent." (p. 15a, *infra*) Thus, according to the Court, insufficiency of evidence of mailing could result in acquittal of mail fraud, while permitting the jury, upon finding the requisite foreseeability, to convict of conspiracy. (p. 15a, *infra*).

On the question of whether limiting instructions should have been given, as requested, the First Circuit aptly phrased petitioner's grievance — that the failure to give such instructions "left open the possibility that the jury might decide that some or all of the documents had in fact been mailed, thereby running afoul of the verdicts previously returned." (p. 16a, *infra*). The request for limiting instructions implicated Fed. R. Evid. 105. (n.7, p. 16a, *infra*)

First, the First Circuit points out that, in light of the trial judge's instructions, (p. 38a, *infra*) "restriction of the evidence by informing the jurors that they could not consider the exhibits as proof of actual mailing would have been redundant." The First Circuit added that the documents "were also relevant to the existence of the conspiracy charged in the indictment," (pp. 16a-17a, *infra*).

Finally, the First Circuit did not read *Dowling* v. *United States*, 110 S.Ct. 668, 674 (1990) "as requiring such an instruction except, perhaps, where evidence is admitted under Fed. R. Evid. 404(b)." (p. 17a, *infra*) Here, according to the opinion, "where the proffer was not admitted pursuant to Rule 404(b) but furnished independent evidence of the precise crime charged in the indictment, limiting instructions were not obligatory, Rule 105 notwithstanding." (p. 17a, *infra*)

## Reasons For Granting The Writ

### I. The First Circuit's Denial Of The Preclusive Effect Of Collateral Estoppel To Evidence Of Criminal Offenses For Which A Defendant Had Been Acquitted Either By A Judge Or By A Jury Presents Important And Unresolved Questions Of Federal Law

The effects of the judicial acquittals and the jury acquittals upon the papers at issue are dealt with separately, as they were dealt with by the First Circuit. (p. 9a, *infra*) In either context, the declination of this Court to apply the preclusive effect of collateral estoppel "in all circumstances," *Dowling* v. *United States*, 110 S.Ct. 668, 672 (1990), leaves unresolved important constitutional or common-law questions. See *id*, at 673. This case, in its factual and legal circumstances, is a most significant vehicle for resolution.

Although petitioner requests that certiorari be granted as to Questions 1.a. and 1.b., *supra*, at i, since the judicial acquittals "obviate any need to guess at the basis for acquittal" (p. 10a, *infra*), the facts underlying question 1.a. make it a "cleaner" question than question 1.b. See also the opinion of the First Circuit at p. 13a, n.5, infra.

#### a. *The judicial acquittals*

Because the judicial acquittals on Counts Two, Three, and Five enable petitioner to carry his "burden to demonstrate that

the issue he seeks to foreclose was actually decided in the first proceeding," *Dowling* v. *United States*, *supra*, at 673, (see p. 10a, *infra*) the question then becomes whether, under the circumstances of this case, in which the first trial judge found the evidence of use of the mails insufficient to meet the requirements of 18 U.S.C. §1341, preclusive effect should have been given to the judge's rulings[7], when the Government was required to prove in the second case "an agreement to defraud plus knowledge that the use of the mails was reasonably foreseeable." *United States* v. *Reed*, 731 F.2d 1059, 1061 (6th Cir., 1983). See *United States* v. *Delgado Figueroa*, 832 F.2d 691, 696-697 (1st Cir., 1987); *United States* v. *Craig*, 573 F.2d 455, 486 (7th Cir., 1977).

The First Circuit reasons that "an inference that the mailing of exhibits 32-34 was reasonably foreseeable [is] an inference entirely separate, and easily distinguishable, from the 'actual mailing' inference rejected by the judge at Trial No. 1." (p. 11a, *infra*)

There is no question, however, that the judicial acquittals at the first trial determined that the government had not proved beyond a reasonable doubt that any one of the documents referred to in any one of Counts Two, Three, and Five was placed in, received from, or caused to be delivered by the mail. An ultimate issue required by 18 U.S.C. §1341 to be determined was determined in petitioner's favor at the first trial.

As in *Dowling*, 110 S.Ct., at 672, "the prior acquittals did not determine an ultimate issue in the present case." Unlike the circumstances in *Dowling*, however, the present case, as it was presented by the government, embraced the same transactions as in the prior case. As the First Circuit points out (p. 6a, *infra*), "substantially the same testimony emerged as at the

[7] "For purposes of applying collateral estoppel, it makes no difference that the trial judge, rather than a jury, acquitted the defendant. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977)"; *United States* v. *Mock*, 604 F.2d 341, 343, n.2 (5th Cir., 1979).

earlier trial." The identical documents pleaded in, and introduced in evidence to prove, Counts Two, Three, and Five at the first trial were introduced to prove the conspiracy at the second trial.

Thus, from the documents and from the evidence demonstrating that they must have been transmitted somehow[8], the second jury was invited to conclude, in the face of the judicial acquittals, (of which it knew nothing), founded upon insufficiency of evidence of the use of the mails, that petitioner intended to use the mails or that it was reasonably foreseeable that the mails would be used. The documents and related testimony were introduced as evidence of an element of the offense being tried. See *United States* v. *Kramer*, 289 F.2d 909, 915-916 (2d Cir., 1961); *United States* v. *De Angelo*, 138 F.2d 466, 469 (3d Cir., 1943), decided before and cited with approval in *Ashe* v. *Swenson*, 397 U.S. 436, 449, n.7 (1970). *Cf. Grady* v. *Corbin*, 110 S.Ct. 2084, 2093 (1990), 58 U.S.L.W. 4599, 4602 (decided May 29, 1990).

An examination of Exhibits 32 through 34 inclusive, including two letterhead communications of the kind often expected to be sent by mail and one check, would lead to a reasonable inference that a jury with average experience would be likely to conclude that the documents were mailed and therefore further infer that mailing was reasonably foreseeable or intended. Contrary to the First Circuit's decision on this point petitioner was indeed compelled to relitigate the

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[8] The prosecutor argued, in closing, in negative pregnant form: "Now, at the time the scheme was entered into it must have been reasonably foreseeable to Dray and Ochs, both of whom were reasonably sophisticated people, it should be obvious that the mails *might* be used in the course of furthering this scheme, and *these* documents are sent back and forth. Now, we don't point to any particular document and say this document was definitely mailed." Second trial transcript, Vol. 9; 14 (argument) (emphasis supplied).

The jury was requested by this argument to infer with respect to each of the seven documents at issue that from the fact "*these* documents are sent back and forth" that one, or more than one, unspecified document was mailed and from that, "it must have been reasonably foreseeable . . . it should be obvious that the mails *might* be used. . . ." The trial judge's instruction (p. 38a) did nothing to limit this inference.

issue as to "whether these papers were mailed." See p. 12a, *infra*.

In this case, in a similar overlap to the overlaps in *De Angelo* and *Kramer*, and unlike *Dowling*, "the documentary evidence offered at Trial No. 2 overlapped with the evidence of actual mailing presented at Trial No. 1." (p. 12a, *infra*). Moreover, the first trial judge's acquittals, as distinguished from the jury acquittals in *United States* v. *Price*, 750 F.2d 363, 366 (5th Cir., 1985) and in *United States* v. *Citron*, 853 F.2d 1055, 1058 (2d Cir., 1988) cannot possibly be termed "inconsistent" and for that reason render inapplicable collateral estoppel as a bar to the introduction of evidence in a second trial[9], as is the case "when an arguably inconsistent verdict is rendered in the first trial" *Price*, 750 F.2d at 365. *Cf. United States* v. *Corley*, 824 F.2d 931, 936-937 (11th Cir., 1987).

In *Dowling* v. *United States*, 110 S.Ct. 668, 672 (1990), this Court "decline[d] to extend *Ashe* v. *Swenson*, [397 U.S. 436 (1970)] and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it related to alleged criminal conduct for which a defendant has been acquitted." *Dowling* dealt with evidence of different conduct from the conduct, evidence of which was offered at the second trial, and dealt with an entirely different transaction from the transactions, evidence of which was offered at the second trial.

It is respectfully submitted that the important unresolved question in this case is whether circumstances such as those

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[9] In *United States* v. *Price*, 750 F.2d 363, 366 (5th Cir., 1985) cited by the First Circuit (pp. 14a, 18a), "[t]he conviction [for conspiracy] at Price's first trial simply meant that the jury returned an inconsistent verdict — valid and supportable — and hence the acquittals as to the other counts are not to be read as a finding favorable to Price on testimony which overlapped each count." Similarly, as the Second Circuit points out in *United States* v. *Citron*, 853 F.2d 1055, 1058 (2d Cir., 1988), with regard to inconsistent verdicts, "[i]n this context, 'principles of collateral estoppel — which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict — are no longer useful.'"

presented by the proceedings in the District Court, in which the same evidence necessary to proof of an ultimate issue at an earlier trial for offenses of which a defendant was acquitted is comprehended in the same transaction at each trial and is introduced as evidence of an essential element of a second offense for which the defendant is prosecuted, are among the circumstances in which such evidence is excluded by the doctrine of collateral estoppel. This is a question left open by the decisions of this Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and *Dowling* v. *United States*, 110 S.Ct. 668, 673 (1990) and a question upon which the recent decision in *Grady* v. *Corbin*, 110 S.Ct. 2084 (1990), 58 U.S.L.W. 4599 may have some bearing.

It is highly probable that the question will recur. Lower courts need guidance as to its resolution.

b. *The jury acquittals*

As is the case with the preclusive effect of the judicial acquittals on Counts Two, Three and Five, on the introduction of documentary facts and associated mailing evidence at the subsequent conspiracy trial, this case raises questions undecided by this Court as to application of the principles in *Dowling* v. *United States*, 110 S.Ct. 668 (1990) and *Ashe* v. *Swenson*, 397 U.S. 436 (1970) to the preclusive effect upon the introduction of such facts at a trial for conspiracy, when the evidence introduced is identical with that which an earlier jury had found not to satisfy the government's burden to prove the substantive offenses, and which relates to the same or closely related transactions.

The additional question in the jury acquittal context is the satisfaction of "the burden on the defendant to demonstrate that the issue whose litigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 110 S.Ct. 668, 673 (1990).

The first trial judge instructed the jury as he is quoted in part in n.6 to the First Circuit's opinion. (pp. 15a, *infra*)

The opinion, however, omits crucial sentences of the second quoted paragraph. The judge instructed in the entirety of this paragraph:

> "In this regard, *it would be sufficient to establish this element of the crime* if the testimony justifies a finding beyond a reasonable doubt that the Defendant caused the mailing by his actions or that he caused the mailing to be undertaken by others. This does not mean that the Defendant himself must specifically have authorized others to do the mailing. When one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not precisely contemplated in that instance, then he can be found to have caused and specifically intended the mails to be used." First trial transcript, Vol. 10; 38. (Emphasis supplied).

Thus, the third of the three essential elements of the offense of mail fraud (First trial, Vol. 10; 26) included, under the judge's charge, the actual mailing, "caused" by the defendant, "caused" being defined in terms of reasonable foreseeability. As the First Circuit says, "The instructions recognized, appropriately, that the same evidence might support findings that Dray both intended a mailing to occur and caused one to occur." (p. 15a) For purposes of discernment of what the first jury concluded, and, respectfully, contrary to the First Circuit's rationale, under the judge's entirely appropriate instructions, see *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954), "there [was no] chasmal gulf between what is 'actual' versus what is 'intended' or 'reasonably foreseeable.'" (p. 10a, *infra*) Adding to the reasoning process the first jury's question (*supra*, at 6) and applying "the rule of collateral estoppel . . . with realism and rationality," *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), it is quite clear that the jury found that petitioner neither intended a mailing to occur nor caused one to occur.

The evidence being insufficient to prove that the documents were in fact mailed, the jury need not have found and did not find, with respect to the two pleaded documents and the two closely related documents, the "requisite foreseeability."

The first jury could, nevertheless, have found, as to Count One, foreseeability in general aspects of Smith's testimony, not related to the documents at issue. *Cf. United States* v. *Corley*, 824 F.2d 931, 937 (11th Cir., 1987) Smith testified that "things" received in Philadelphia were delivered by mail or Federal Express. "The mail between Boston and Philadelphia and back is horrible." First trial transcript, Vol. 4; 7, 8. In his motion in limine before the second trial, petitioner requested, as the motion was amended at the motion hearing, and at trial, as the documents were offered, to include the related documents not pleaded, that the pleaded documents "and related evidence to the mailing of the foregoing documents" be excluded, not that all evidence as to mailing be excluded. Appendix to briefs on appeal, 33.

Petitioner having met his burden "to demonstrate that the issue he seeks to foreclose was actually decided in the first proceeding," *Dowling* v. *United States*, 110 S.Ct. 668, 673 (1990), the important unresolved questions raised by that portion of the First Circuit's opinion which dealt with the prior judicial acquittals are the same.

II. THE FIRST CIRCUIT'S HOLDING AS TO DENIAL OF LIMITING INSTRUCTIONS AS TO FACTS DETERMINED BY PREVIOUS ACQUITTALS IS IN CLEAR CONFLICT WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS AS TO THE STANDARD OF REVIEW AND WITH DECISIONS OF THE SEVENTH AND ELEVENTH CIRCUITS ON THE ISSUE OF WHETHER SUCH INSTRUCTIONS ARE REQUIRED, WHEN REQUESTED, AND IS ALSO INCONSISTENT WITH THE RATIONALE OF THIS COURT IN *Dowling* v. *United States*, 110 U.S. 668 (1990)

a. *The standard of review of the issue as to the application of Rule 105, Federal Rules of Evidence, is not for abuse of discretion*

The First Circuit's standard of review of the denial of limiting instructions "solely for abuse of discretion" (p. 16a, *infra*)

conflicts with the Fifth Circuit's holding in *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors*, 630 F.2d 250, 266 (5th Cir., 1980)[10] and with the dictum of the Sixth Circuit in *United States* v. *Gallo*, 763 F.2d 1504, 1528 (6th Cir., 1985) ("specific mandate required by Rule 105") *Cf.* as to discretion in the ***admissibility*** of evidence, *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988). (order of proof) The issue in this case is whether Fed. R. Evid. 105 was or was not applicable, not whether it was an abuse of discretion to deny its application.

b. *The application of the Federal Rules of Evidence in* Dowling *v.* United States, *110 U.S. 668 (1990).*

*In Dowling* v. *United States*, 110 S.Ct. 668 (1990), shortly after the introduction of certain evidence admissible under Rule 404(b), and again in its final charge, the District Court instructed the jury of the defendant's previous acquittal and "emphasized the limited purpose for which [the previous victim's] testimony was being offered." *Id*, at 671. This Court, after rejecting the contention that introduction of the evidence was precluded by collateral estoppel, "[e]specially in light of the limiting instructions . . . [declined to] hold that the introduction of [the previous victim's] testimony merits [Due Process] condemnation." 110 S.Ct. at 674.

The First Circuit, however, did not read the *Dowling* case as requiring a limiting instruction, "except, perhaps, where evidence is admitted under Fed. R. Evid. 404(b)." (p. 17a, *infra*).

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[10] "Once the court determines that such evidence should be admitted, . . . it cannot refuse a requested limiting instruction." *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors*, 630 F.2d 250, 266 (1980).

c. *The holding of the First Circuit as to limiting instructions is in plain conflict with holdings of the Seventh and Eleventh Circuits, when issues of fact have been determined by prior acquittals but collateral estoppel is denied.*

The Seventh Circuit held, in *United States* v. *Gentile*, 816 F.2d 1157 (7th Cir., 1987) that the acquittal of the defendant upon a charge of illegal interstate travel did not require the application of collateral estoppel to exclude evidence to be offered at the defendant's second trial, after mistrial, upon a charge of possession with intent to distribute cocaine and upon a new charge of making false statements to federal agents. This holding was accompanied, however, by the Seventh Circuit's requirement, "[a]s a protective measure," that "the district judge on retrial should admit the testimony of the five witnesses relevant to the possession charge, but only after the government has stipulated to the three facts necessarily established by [the acquittal by] the first jury and after the district court judge has cautioned the jury as to the jury's limited use of the five witnesses' testimony if such an instruction is desired by the defendant." 816 F.2d at 1164.

Similarly, the Eleventh Circuit, in *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir., 1988), after acquittals of the defendant upon charges of importation of and conspiracy to import cocaine, held that collateral estoppel did not bar retrial on charges of conspiracy to possess and possession with intent to distribute. Nevertheless, in pre-second trial circumstances similar to those in *Gentile*, the Court said:

> "We recognize that some of the evidence in the possession for distribution counts is inextricably tied to evidence on the importation counts. However, any evidence that concerned distribution that was not rejected by the jury, even if that evidence is also related to the importation counts, is admissible for the retrial on counts 2 and 4. The

> trial judge *must make clear to the jury that such evidence should only be considered as relating to the distribution aspects of the case.*" 836 F.2d at 1317 (emphasis supplied).

Although Fed. R. Evid. 105 is not expressly referred to in either decision, plainly each is a holding with respect to the treatment of evidence which is admitted for a particular purpose, in which the trial court is required to "restrict the evidence to its proper scope and [to] instruct the jury accordingly." Neither involves a limitation upon evidence otherwise admissible under Rule 404(b). Compare the opinion of the First Circuit at p. 17a, *infra*.

Finally, it is clear from the directions given to the trial courts by the Seventh Circuit and by the Eleventh Circuit that if issues of fact relevant to the second prosecution remain, defendants are entitled to limiting instructions as to the issues of fact no longer remaining after the prior acquittals, even though collateral estoppel is not applied to facts determined by the acquittals. Contrast *United States* v. *Martin*, 794 F.2d 1531, 1533 (11th Cir., 1986); *United States* v. *Gallo*, 763 F.2d 1054, 1528 (6th Cir., 1985) (no prior acquittals in either case). The prosecutor's closing argument in this case reinforced the necessity that the jury be made aware that none of the documents introduced could be considered as evidence of mailing. See n.8, *supra*, at 18.

d. *Why review of the denial of the limiting instructions is warranted*

The First Circuit has established a procedural bar to review, except for abuse of discretion, of trial court's rulings upon the application of Fed. R. Evid. 105, and, as well, a rationale for the application of Rule 105, each of which is in conflict with decisions of other circuits. This dual evidentiary holding should be reviewed by this Court to delineate the manner of

future appellate treatment of Rule 105 questions and to make clear when and in what circumstances the Rule becomes applicable.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

# United States Court of Appeals
## For the First Circuit

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No. 89-1024

UNITED STATES OF AMERICA,

APPELLEE,

*v.*

RICHARD M. DRAY,

DEFENDANT, APPELLANT.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

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Before

SELYA, ALDRICH and CYR, *Circuit Judges*.

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*William P. Homans, Jr.*, with whom *Homans, Hamilton & Dahmen* was on brief for appellant.

*F. Dennis Saylor, IV*, Assistant United States Attorney, with whom *Wayne A. Budd*, United States Attorney, was on brief for the United States.

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MARCH 28, 1990

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SELYA, *Circuit Judge*. like a phoenix, this case arises for a second time, but with all the ascendant vigor of its first incarnation. And, like its legendary avine counterpart, this bird, too, turns to ashes. The tale follows.

## I. BACKGROUND

In February 1987, defendant-appellant Richard Dray, along with Paul Ochs, was convicted of conspiracy to commit mail fraud. 18 U.S.C. §§ 371, 1341 (1982). At the same trial, Dray and Ochs were acquitted on five substantive mail fraud counts. In the aftermath of the Court's opinion in *McNally* v. *United States*, 483 U.S. 350 (1987), we vacated the convictions and remanded for retrial of the conspiracy count. *See United States* v. *Ochs*, 842 F.2d 515 (1st Cir. 1988). At the new trial, the defendants were again convicted on the conspiracy charge. Dray appeals, giving wing to several new arguments and necessitating that we revisit the matter from quite a different direction.

### A

We recount the facts necessary to an understanding of this appeal in the light most congenial to the prosecution, as precedent requires, *see, e.g., United States* v. *Tierney*, 760 F.2d 382, 384 (1st Cir.), *cert. denied*, 474 U.S. 843 (1985), referring the motivated reader to our earlier opinion for a more exegetic narration. *See Ochs*, 842 F.2d at 517-19.

This prosecution arose out of the renovation of the Kresge Building in downtown Boston by Temple Place Associates (TPA), a Philadelphia-based limited partnership. TPA contracted with a local firm, Stanhope Development Company (Stanhope), to represent it and oversee the rehabilitation. Stanhope, like TPA, was formed exclusively for the Kresge project. One of Stanhope's duties was to assist in obtaining municipal permits. Mirabassi Associates, Inc. (Mirabassi), the general contractor and construction manager, was obligated

to pay the fees for such permits. Ochs was a Stanhope partner. At his urging, TPA hired Dray, a well-connected Boston attorney, to handle permit-related legal matters.

Among his other attributes, Dray had known Douglas Robinson, an official of the city's Department of Inspectional Services, for some fifteen years. Ochs and Dray planned to bribe Robinson so that he would place the city's imprimatur upon a fraudulent application containing a gross understatement of project-related costs. Because the construction permit fee was calculated according to such estimates, "lowballing" the costs would effectuate a savings.

The evidence showed that Mirabassi calculated the real cost of the work to be $2,425,000. If submitted to the city, that estimate would have produced a permit fee of $23,950. When a Mirabassi engineer told Dray that the application was ready, Dray replied that the price tag was too grand. Dray directed that an application be prepared which falsely reflected $1,200,000 as the projected cost. Dray delivered the fraudulent application; Robinson processed and approved it. Because of the arithmetical fiction, the permit fee was reduced to $11,750. Mirabassi paid this bargain price and received the *nihil obstat*.

Of course, these machinations resulted in a windfall to Mirabassi — but the wind did not blow in that direction for long. To capture it, Dray and Ochs breezily embarked on a program of creative invoicing. First, Dray billed TPA $1,687.50 for conferring with Ochs and preparing and filing the permit application. Ochs transmitted this bill to TPA, which paid it. The next day, Dray billed Mirabassi $5,975 (roughly half the savings) for preparing and filing the same permit application. Although Mirabassi had not retained Dray and was not contractually bound to honor his invoice, Ochs hand-delivered it and directed Mirabassi to effect payment. Presumably because Mirabassi, having saved over $12,000, was well ahead of the game financially, it made the requested

payment. In short order, Dray wrote a check to Ochs for $3,000 and gave Robinson approximately $400 in cash.[1]

Not content with the profit in hand, appellant sent another bill to TPA almost a year later. This statement asked $30,000 for legal services, again including the permit-related work. When Ochs protested, for TPA, that the charges were inordinate, Dray wrote back reminding him of the importance of Dray's political connections to the rehabilitation project. Ochs convinced TPA to pay the full $30,000.

B

A federal grand jury thereafter handed up a six count indictment against Dray and Ochs. Count 1 charged the defendants with conspiring to use the mails in furtherance of a scheme to defraud the city, Mirabassi, and TPA. The remaining counts charged them with substantive violations of the mail fraud statute, 18 U.S.C. § 1341. When trial began, the government introduced evidence of where the contracting parties were located (Boston and Philadelphia) and showed that the mails were frequently used to transmit papers between them. The government also introduced seven specific documents which paralleled the five substantive offenses charged in the indictment (two documents related to count 4 and two to count 6). These papers were introduced through J.W. Smith, a ranking TPA employee. According to Smith, it was the customary practice of TPA and Mirabassi to send written materials back and forth either by mail or Federal Express, depending on time constraints. Smith could not recall specifically whether the seven documents in question were mailed or transmitted in some other fashion. The government attempted to fill this gap by resort to circumstantial evidence. For instance, by comparing a document's internal date with the date of its apparent

[1] Although Robinson was supposed to receive one-sixth of the amount euchred from the city (roughly, a $2,000 share), Dray never gave him any more money on account of these shenanigans. Honor, even among thieves, may all too often be, in the bard's phrase, "a mere scutcheon." W. Shakespeare, *Henry IV Part I*, act V, sc. 1 (1598).

receipt, one might infer whether it had been mailed or had been delivered overnight. The rest of the prosecution's case was rock solid; turned sovereign's evidence under a grant of immunity, Robinson was the star witness.

While Federal Express is a useful intercommunicative device when celerity enters into the equation, *cf.*, *e.g.*, *United States* v. *LaFrance*, 879 F.2d 1, 2 (1st Cir. 1989) (discussing service's utility "[w]hen contraband absolutely, positively has to get there overnight"), it is a form of delivery which falls beyond the reach of the federal mail fraud statutes. *See United States* v. *Massey*, 827 F.2d 995, 1000 (5th Cir. 1987); *United States* v. *Wosepka*, 757 F.2d 1006, 1010 (9th Cir. 1985). At the close of the case in chief, the district court (Woodlock, J.), while acknowledging "a possibility that the mails were used," ruled that the proof of mailing as to three specific offense counts was too exiguous to warrant consideration by the jury. The court stressed the likelihood that "Federal Express was used" for some (or all) of the materials transmitted. Accordingly, judgments of acquittal were directed as to counts 2, 3, and 5. The case went to the jury on the remaining charges (conspiracy, count 1; and two specific offenses, counts 4 and 6). The jury convicted both defendants of conspiracy, but otherwise acquitted them.

While the defendants' appeals were pending, the Supreme Court ruled that the mail fraud statute did not extend to deprivations of intangible rights. *McNally*, 483 U.S. at 356. Because Judge Woodlock, in full accord with prior precedent, had instructed the jury on several alternative theories of mail fraud, including the theory that mail fraud could encompass a scheme to defraud the public of an "intangible political or civil right," we overturned the convictions and remanded for a new trial. *See Ochs*, 842 F.2d at 521-27.

C

Dray and Ochs were retried before a different judge (Mazzone, J.) under a redacted indictment limited to the con-

spiracy count. Before trial, Dray filed a motion in limine to bar reference to either the seven documents or the mailing thereof.[2] He argued that because those documents comprised the evidence against him on the mail fraud charges of which he stood acquitted, principles of collateral estoppel precluded their use at the conspiracy count's retrial. The district court denied the motion, ruling that the documents themselves, and the associated evidence, could be introduced. The judge simultaneously rebuffed appellant's request for limiting instructions.

At the second trial, substantially the same testimony emerged as at the earlier trial. The seven documents were again admitted as full exhibits. After unsuccessfully moving for judgment of acquittal, Dray was found guilty (as was Ochs). It is against this backdrop that we view Dray's legal arguments, referring from time to time, for ease in reference, to the earlier trial as "Trial No. 1" and to the replay as "Trial No. 2."

## II. PRINCIPLES OF COLLATERAL ESTOPPEL

Collateral estoppel is not only a principle of substantive federal law. In the criminal context, it is imbued with constitutional dimensions. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970); *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 584 (1st Cir.), *cert. denied*, 484 U.S. 989 (1987). In certain respects, the doctrine stands as a sentinel safeguarding the Double Jeopardy Clause of the fifth amendment.

We are fortunate that on the eve of oral argument herein the Court restated its views on collateral estoppel in *Dowling* v. *United States*, 110 S.Ct. 668 (1990). *Dowling* involved a prosecution for bank robbery. Although defendant had been acquitted of burglary in an earlier case, the district court allowed the victim to identify defendant as the man who entered her

[2] We set forth as an appendix to this opinion a table outlining the documents; their exhibit numbers at each trial; their relationship to specific offenses; and a thumbnail sketch of their contents.

apartment during the burglary. The rationale for admitting the testimony was to buttress an identification of defendant as the bank robber; the perpetrator in both cases wore a ski mask and carried a small pistol. *Id.* at 670. The Supreme Court held the evidence admissible under Fed. R. Evid. 404(b). *Id.* at 672. Because the threshold standard of proof was lower under that Rule than for a criminal conviction itself, the Court found "the collateral estoppel component of the Double Jeopardy Clause ... inapposite." *Id.* The jury might reasonably conclude that the same man was involved in both cases, even if it did not believe beyond a reasonable doubt that defendant had committed burglary. *Id.* The Court emphatically rejected the notion that "collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the government failed to prove violated a criminal law," *Id.* at 673, and explicitly declined:

> to extend *Ashe* v. *Swenson* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances ... relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

*Id.* at 672. In practice, then, because the prior burglary acquittal did not actually determine an ultimate issue presented in the bank robbery case, reuse of the evidence was appropriate. *Id.* And in terms of broader implications, *Dowling* signalled that, even as between the same parties, only those issues actually decided in the earlier case are foreclosed from relitigation in a later case. Preexisting caselaw in this circuit is fully consistent with the driving principle which powers the *Dowling* rationale. *See, e.g., Gonzalez-Sanchez,* 825 F.2d at 584; *United States* v. *DeVincent,* 632 F.2d 147, 154 (1st Cir.), *cert. denied,* 449 U.S. 986 (1980).

Narrowing the lens of inquiry, it seems clear in light of *Dowling* that if an issue determined in a prior proceeding

between the same parties (or their privies) constitutes a necessary element of a subsequent prosecution, collateral estoppel will likely operate as a complete bar to the latter prosecution; otherwise, the doctrine at most may forestall the presentation of particular evidence and arguments. *See United States* v. *Ricks*, 882 F.2d 885, 889 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 846 (1990). Where it is impossible to discern whether a particular issue was previously resolved in a defendant's favor, preclusive effect must be denied. *See, e.g., Gonzalez-Sanchez*, 825 F.2d at 583-84 (evidence of prior crime admissible at later trial, notwithstanding earlier acquittal, to prove "a fact that was not necessarily decided by the jury in reaching its verdict"); *United States* v. *Ranney*, 719 F.2d 1183, 1187 (1st Cir. 1983) (collateral estoppel "inappropriate [where] the jury most likely grounded its verdict on an issue other than the one which defendants seek to foreclose"); *DeVincent*, 632 F.2d at 154 (same); *see also United States* v. *Rodriguez-Estrada*, 877 F.2d 153, 157 (1st Cir. 1989) (collateral estoppel "has long been thought inoperative as to 'evidentiary or mediate facts'") (quoting *Yates* v. *United States*, 354 U.S. 298, 338 (1957)).

The task of separating evidentiary wheat from collaterally estopped chaff in a case where a previous judgment of acquittal was based upon a general verdict follows a well-established protocol. The reviewing tribunal must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444; *see also Dowling*, 110 S.Ct. at 673 (reaffirming *Ashe* approach); *cf. Rodriguez-Estrada*, 877 F.2d at 157 (comparing evidence, findings, and issues between earlier civil and later criminal trials). In conducting this review, we must be "practical" and not too "technically restrictive," *Ashe*, 397 U.S. at 444, remaining mindful of the totality of the circumstances. *See Dowling*, 110 S.Ct. at 673; *Ashe*, 397 U.S. at 444. In the last analysis, the burden is

on defendant "to demonstrate that the issue whose relitigation he seeks to foreclose was *actually* decided in the first proceeding." *Dowling*, 110 S.Ct. at 673 (emphasis supplied).

## III. APPLICATION OF COLLATERAL ESTOPPEL PRINCIPLES

As we have shown, criminal collateral estoppel involves a brace of inquiries: (1) Has defendant demonstrated that an ultimate issue of fact was actually decided in his favor at the first proceeding? (2) If so, would defendant be required to relitigate the same issue at the retrial? In posing the questions here, ease in exposition demands that we treat separately those papers which were the subject of Judge Woodlock's direction for acquittal and those which were the subject of the jury's general verdicts.

### A

Appellant argues that the judicially directed acquittals on counts 2, 3, and 5 of the unredacted indictment determined an ultimate fact — the absence of mailing — in his favor. Pyramiding on this supposition, he asserts that the documents' reintroduction at his second trial was foreclosed. Dray's analysis, however, is much too superficial.

Counts 2 through 6 of the indictment charged substantive mail fraud, whereas count 1 charged conspiracy to commit mail fraud. These are distinct crimes having distinct elements. The critical difference for our purposes is that substantive mail fraud requires a showing that the mails were actually used to further the scheme or artifice. *See United States* v. *Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States* v. *Contenti*, 735 F.2d 628, 631 (1st Cir. 1984). Mail-fraud conspiracy, on the other hand, necessitates only that the prosecution show intent to use the mails or show that such use was reasonably foreseeable. *See United States* v. *Delgado Figueroa*, 832 F.2d 691, 697 (1st Cir. 1987); *Silvano*, 812 F.2d at 760. In contem-

plation of law, there is a chasmal gulf between what is "actual" versus what is "intended" or "reasonably foreseeable." That the evidence needed to prove these separate elements may often overlap, or may (as here) be identical, cannot eradicate this important distinction.

As to the three counts presently under consideration, Judge Woodlock's bench decision granting defendants' Fed. R. Crim. P. 29(a) motion obviates any need to guess at the basis for acquittal. *See United States* v. *Pappas*, 445 F.2d 1194, 1197-98 (3d Cir.), *cert. denied*, 404 U.S. 985 (1971). It is transparently clear that the judge determined only that there was insufficient evidence from which a jury could conclude beyond reasonable doubt that the three documents in question (exhibits 13-15 in Trial No. 1; exhibits 32-34 in Trial No. 2) had actually been mailed. Nothing in his ruling suggests that Judge Woodlock believed, or found, that mailing was not intended or reasonably foreseeable. Indeed, that the judge denied Rule 29(a) motions addressed to the conspiracy count at Trial No. 1, and did not strike the documents in question or limit the jury's use of them, suggests exactly the opposite. Hence, it remained open to the government to relitigate the issues of intent to mail and reasonable foreseeability at Trial No. 2 and to use the challenged evidence to that end.

Defendant argues for a contrary result, relying principally upon *United States* v. *Salamone*, 869 F.2d 221 (3d Cir.), *cert. denied*, 110 S.Ct. 246 (1989). In *Salamone*, the Third Circuit wrote:

> [W]here a jury's acquittal of a defendant in a first prosecution necessarily was grounded upon its resolution of a particular issue, reprosecution is constitutionally barred where redetermination of the issue would be essential to the defendant's conviction, and . . . the government is collaterally estopped from relitigating the issue even if a contrary resolution is *not* necessary to convict the defendant, but simply would constitute evidence against him or her.

*Id.* at 226. While this language, in isolation, offers beguiling comfort to appellant, giving context to the words dispels the illusion. In *Salamone*, the court held that, at defendant's later trial on firearms charges, certain evidence of his association with reputed gangsters was inadmissible because, at his earlier trial, the jury had acquitted him of membership in a conspiracy involving those persons. *Id.* at 231. For purposes of the second trial, the "inescapable implication" of the associational evidence was that Salamone acquired the weapons "pursuant to his connection with [those] individuals" and that "there was some sort of nefarious conspiracy" between them. *Id.* Because this theory was, as a practical matter, identical to the claim the first jury had definitively rebuffed, the evidence — concededly not relevant in any other way — was inadmissible; it was being introduced *for the same purpose* at a later trial after the original factfinder had flatly "reject[ed] an inference from this testimony essentially indistinguishable from that the one the government desired the [second] jury to draw." *Id.*

The case at bar is at a considerable remove from *Salamone*. Here, the government sought to have the jury at Trial No. 2 draw an inference that the mailing of exhibits 32-34 was reasonably foreseeable — an inference entirely separate, and easily distinguishable, from the "actual mailing" inference rejected by the judge at Trial No. 1. Under the prevailing view of collateral estoppel, the government cannot be barred, *ipso facto*, from using evidence merely because the same evidence was used in an earlier (unsuccessful) prosecution. *See United States* v. *Price*, 750 F.2d 363, 365-66 (5th Cir.) (overlapping evidence may permissibly be reintroduced so long as relevant to more than prior acquitted crime), *cert. denied*, 473 U.S. 904 (1985); *DeVincent*, 632 F.2d at 154 (similar). The key to reuse is independent significance: does the proof bear on an issue (or issues) materially different from those actually determined at the former trial? *Salamone* recognized and accepted this very principle, reaffirming the government's entitlement to introduce evidence establishing the crimes charged at the

second trial "even though the evidence paralleled evidence introduced in" the first trial. 869 F.2d at 229. Thus, although the documentary evidence offered at Trial No. 2 overlapped with the evidence of actual mailing presented at Trial No. 1, reintroduction was permissible because of the evidence's relevance to issues wholly distinct from any issue theretofore decided in appellant's favor.[3] *See Id.* at 228-29; *Ranney*, 719 F.2d at 1186-87; *DeVincent*, 632 F.2d at 154.

In a nutshell, Trial No. 1 conclusively determined the government's inability to prove that the three documents in question were *actually* mailed. Retrial on the conspiracy charge did not compel appellant to relitigate whether these papers were mailed. Rather, the disputed evidence was allowed at Trial No. 2 in order to demonstrate the existence of a conspiracy and the co-conspirators' reasonable foreseeability of mailing. Reintroduction of the three documents and Smith's rehashed testimony as to the parties' usual office practices was proper for these purposes. It follows, as night follows day, that because no issue determined in appellant's favor at his first trial was relitigated at the second, collateral estoppel did not bar use of the three exhibits.

B

We turn next to the jury's general acquittal on counts 4 and 6 of the unredacted indictment. Dray asseverates that the ver-

[3] Appellant's reliance on *Gonzalez-Sanchez* for a divergent result is likewise mislaid. To be sure, we wrote there, by way of dicta, that "evidence of a prior crime for which defendant was acquitted is inadmissible in a later trial, *unless the evidence goes merely to a collateral fact . . . that was not necessarily decided by the [first] jury in reaching its verdict.*" 825 F.2d at 583-84 (emphasis supplied). But, the government had "concede[d] . . . that the [challenged] evidence was admitted in error," and our holding went to whether admitting the evidence was harmless beyond a reasonable doubt. *See Id.* at 584. Moreover, *Gonzalez-Sanchez*, like *Dowling*, involved the admission at a later trial of evidence of a prior crime for which defendant had been acquitted, using Fed. R. Evid. 404(b) as a fulcrum. In light of *Dowling* (which, unlike the case at bar, dealt with collateral estoppel principles in a Rule 404(b) setting), we would certainly in a proper case reconsider the *Gonzalez-Sanchez* dicta. We have no occasion to do so today.

dicts necessarily signalled a determination that no fraudulent scheme existed, or if one did, that he was not a willful participant therein, or that mailing of the documents upon which these counts depended (exhibits 16-19 in Trial No. 1; exhibits 35-38 in Trial No. 2) was not foreseeable. In appellant's view, the compactness of this list of options is enough to trigger a collateral estoppel bar.

We approach this inquiry conscious of the need to take into account the entire record of the proceedings. *See Dowling*, 110 S.Ct. at 673; *Ashe*, 397 U.S. at 444. At Trial No. 1, the jury did more than acquit Dray on counts 4 and 6; it also convicted him on count 1 (the conspiracy charge). Given these simultaneous and facilely reconcilable verdicts, appellant's account of the jury's factfinding becomes fanciful. The sockdolager is this: in order to have convicted appellant of conspiracy, the first jury must have found all the necessary elements of that crime, including the existence of a conspiracy and appellant's knowing and willful participation therein. Appellant's acquittal on the substantive counts cannot logically be attributed to a jury finding to the contrary.[4] The same sort of reasoning lays waste to Dray's claim that the first jury must have decided the issue of reasonable foreseeability. In respect to the specific offense counts, the jurors were told that they should acquit unless the government had proved actual mailing beyond reasonable doubt. Taking into account the conspiracy conviction, it seems highly probable, if not ineluctable, that the original jury found insufficient evidence that the exhibits in question were actually mailed, but sufficient evidence that mailing was contemplated.[5]

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[4] It is similarly implausible to posit that appellant's conviction rested on a conclusion that Ochs committed the two overt acts of mailing; Judge Woodlock specifically instructed the jury that "[e]ach defendant is entitled to have his guilt or innocence . . . determined from the evidence which applies to him as if he were being tried alone."

[5] There is another possible scenario equally devastating to Dray's position. The four exhibits all bore upon appellant's climactic $30,000 bill to TPA, sent nearly a year after the building permit was obtained and certain spoils divided. Hence, the first jury could have found that the scheme between

Notwithstanding questions from the first jury during its deliberations, the possibility of jury compromise does not alter our conclusion. After all, appellant's conspiracy conviction at the first trial "indicates that the jury found the relevant facts adversely to [him], notwithstanding the acquittals on other related counts . . .; the conviction casts doubt on whatever factual findings might otherwise be inferred from the related acquittal[s]." *United States* v. *Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988) (citations omitted); *cf. Price*, 750 F.2d at 366 (similar; discussing inconsistent verdicts).

On any fairminded view of the overall record, then, we are left with a choice among a variety of plausible theories as to what ultimate factual issues were actually decided by the jury at Trial No. 1. The probabilities veer sharply away from the self-serving conclusion which appellant would have us read into the jury's verdict. Gossamer strands of possibility and surmise are not the stuff of which the preclusory bar of criminal collateral estoppel may be fashioned. Sturdier threads are needed. On this gauzy record, Dray cannot meet his burden of demonstrating "that the issue whose relitigation he seeks to foreclose was *actually* decided in the first proceeding." *Dowling*, 110 S.Ct. at 673 (emphasis supplied); *see also Ashe*, 397 U.S. at 444; *Gonzalez-Sanchez*, 825 F.2d at 583-84; *Ranney*, 719 F.2d at 1187.

C

Appellant, vigorously represented by able counsel, has one more string to his collateral estoppel bow. He asserts that this case is "different" because Judge Woodlock's jury instructions on substantive mail fraud frankly invite the conclusion that

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Dray and Ochs was completed when TPA and Mirabassi paid the initial round of invoices — events which occurred many months before the wrangling over the $30,000 bill took place. On that hypothesis, the acquittals on counts 4 and 6 might well have meant no more than that the jury believed the four exhibits were not mailed "in furtherance of" the conspiracy.

the acquittals meant mailing was not reasonably foreseeable.[6] This thesis posits that the judge's charge made reasonable foreseeability a "sub-element" of actual mailing, so that, "more probably than not," the acquittals were based on insufficient evidence as to foreseeability. The assertion is more cry than wool. We explain briefly.

By their own terms, the instructions were not given on the issue of mailing, but explicated the government's burden as to criminal intent. The instructions recognized, appropriately, that the same evidence might support findings that Dray both intended a mailing to occur and caused one to occur. We are nevertheless at a loss to understand how or why the jury was constrained by the instructions to draw both inferences, or neither. It remains altogether plausible that Dray specifically intended that mailings were to occur (and that the jury so found), but that this intent was frustrated in some fashion (say, by the fortuitous use of Federal Express). If the evidence was insufficient to prove beyond a reasonable doubt that the documents were in fact mailed, the jury could then consistently acquit appellant of mail fraud, yet convict him of conspiracy, finding the requisite foreseeability.

There was no error in the admission of the disputed evidence during Trial No. 2. Collateral estoppel was not a bar to its reutilization.

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[6] The judge charged in relevant part:

> The Government must prove not only that the alleged mailing actually occurred, but also that the defendant specifically intended that such a mailing occur. In meeting this burden, it is not necessary for the defendant to be directly or personally involved in a mailing as long as the mailing is reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant was accused of participating.
>
> . . . When one does an act with the knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not precisely contemplated in that instance, then he can be found to have caused and specifically intended the mails to be used.

## IV. NEED FOR LIMITING INSTRUCTIONS

In a related vein, Dray contends that Judge Mazzone erred by failing to restrict the use of the admitted documents at the second trial. The facts are these. When the judge denied Dray's motion in limine, the defense requested that admission of the documents be limited.[7] Two proposals were advanced. Dray's primary idea was that the documents should be received only on the issue of whether a conspiracy existed, and not for determining whether it was reasonably foreseeable that they would be mailed; on this thesis, the jury was to be specifically instructed that the documents had been not mailed. As an alternative, Dray asked that the evidence be limited to the issue of reasonable foreseeability. Judge Mazzone adopted neither suggestion. According to appellant, the court's recalcitrance left open the possibility that the jury might decide that some or all of the documents had in fact been mailed, thereby running afoul of the verdicts previously returned.

We review the denial of limiting instructions solely for abuse of discretion. On this basis, we see no error. Having reminded the jury twice that this case was not about substantive mail fraud, but conspiracy, Judge Mazzone painstakingly explained the difference. He told the jury, in so many words, that mailing was *not* the issue. The jurors' task at Trial No. 2 was to determine whether the government had proved that there was "a conspiracy to devise a scheme to defraud . . . in which it was reasonably foreseeable that the mail would be used." Viewed in this light, restriction of the evidence by informing the jurors that they could not consider the exhibits as proof of actual mailing would have been redundant. Having made clear by explicit and exacting instructions that actual

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[7] The request implicated Rule 105, which provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 105.

mailing was not an issue in the case, it was unnecessary — and would have been confusing — to tell the jury not to consider the documents on that (non)issue. And, there was no reason to restrict the admission of the documents solely to the issue of reasonable foreseeability; as Judge Mazzone ruled, they were also relevant to the existence of the conspiracy charged in the indictment.

Appellant argues that *Dowling* required the district court to frame some limiting instruction. We do not read *Dowling*, 110 S.Ct. at 671, 674, as requiring such an instruction except, perhaps, where evidence is admitted under Fed. R. Evid. 404(b). In such circumstances, whether or not collateral estoppel concerns are present, limiting instructions are commonly used and serve a prophylactic purpose. *See, e.g., Huddleston* v. *United States*, 108 S.Ct. 1496, 1502 (1988); *United States* v. *Ingraham*, 832 F.2d 229, 234 (1st Cir. 1987) (discussing value of limiting instructions as to Rule 404(b) evidence), *cert. denied*, 486 U.S. 1009 (1988); *see also Dowling*, 110 S.Ct. at 674. In a case like this one, where the proffer was not admitted pursuant to Rule 404(b) but furnished independent evidence of the precise crime charged in the indictment, limiting instructions were not obligatory, Rule 105 notwithstanding. *See United States* v. *Martin*, 794 F.2d 1531, 1533 (11th Cir. 1986); *United States* v. *Gallo*, 763 F.2d 1504, 1528 (6th Cir.), *cert. denied*, 475 U.S. 1017 (1985). We discern neither legal error nor unfair prejudice in consequence of Judge Mazzone's refusal to restrict the jury's use of the evidence.

## V. THE McNALLY ARGUMENT

Shifting gears, appellant contends that the $12,200 "savings" — the difference between the fee due to Boston if the projected rehabilitation cost had been candidly disclosed and the fee actually paid on the basis of the apocryphal estimate — was not "money or property" within the meaning of 18 U.S.C.

§ 1341.[8] Rather, the city was deprived of "a mere unilateral expectation" that it would collect the larger fee. These mental gymnastics fall rather flat.

We have already indicated that the charges which remained after excising "intangible rights" from the indictment (low-balling and double billing) "both involve property deprivations and thus survive *McNally*." *Ochs*, 842 F.2d at 527; *see also United States* v. *Doherty*, 867 F.2d 47, 55 (1st Cir.) (applying *Ochs*), *cert. denied*, 109 S.Ct. 3243 (1989). That statement is thoroughly supported by an examination of section 1341 jurisprudence. The mail fraud statute is limited to the protection of property rights, but the concept of property "is to be interpreted broadly." *McNally*, 483 U.S. at 356. Since *McNally*, section 1341's prohibitions have been read to reach schemes designed to deprive persons, and governments, of a wide array of interests. *See, e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (deprivation of newspaper's interest in pre-publication confidentiality and exclusive use of contents); *Doherty*, 867 F.2d at 56 (scheme involving theft of police department promotional examinations); *see also United States* v. *Allard*, 864 F.2d 248, 251 (1st Cir. 1989) (fraudulent procurement of medical license and subsequent, remunerated medical practice). Given this expansive interpretation of "money or property," Boston's loss (and appellant's corresponding gain) is easily accommodated within the statutory framework.

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[8] The statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of mail fraud].

18 U.S.C. § 1341 (1982).

In this case, the permit fee was no mere unilateral expectation, as appellant exhorts, but a legal obligation. Where such fees are required, conspiracies to avoid paying them deprive the soverign of a very concrete and tangible kind of property — cash. We think it obvious that a governmental agency is deprived of "money or property" when persons attempt to evade, or divert, the payment of legally required fees and taxes. Other courts apparently agree. *See, e.g., United States* v. *Gelb*, 881 F.2d 1155, 1162 (2d Cir.) (scheme to defraud Postal Service of revenue from mass mailings), *cert. denied*, 110 S.Ct. 544 (1989); *United States* v. *Doe*, 867 F.2d 986, 989 (7th Cir. 1989) (scheme to defraud city of real estate taxes by granting assessment reductions); *United States* v. *Turoff*, 701 F.Supp. 981, 985 (E.D.N.Y. 1988) (scheme to avoid payment of license-renewal fees); *United States* v. *Gill*, 673 F.Supp. 275, 281 (N.D. Ill. 1987) (scheme to defraud county by diverting license fees).[9] The permit fees lost by the City of Boston constituted a loss of "money or property" under section 1341 sufficient to bring appellant's connivance within the statutory sweep.

## VI. CONCLUSION

We need go no further. This phoenix, consumed not by fire but by greed, will no longer fly. In the absence of any cognizable legal error, appellant's conviction must be, and hereby is, *Affirmed*.

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[9] *United States* v. *Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 109 S.Ct. 307 (1988), and *United States* v. *Kato*, 878 F.2d 267 (9th Cir. 1989), upon which Dray relies, are well wide of the mark. In *Murphy*, the defendant helped an ineligible organization obtain a bingo license in return for a weekly payoff *from the bingo operator*. 836 F.2d at 249. The Sixth Circuit held that the state's right to accurate permit-related information was an intangible right outside the scope of section 1341. *Id.* at 254. In that case, however, there is no indication that the state was deprived of a licensing fee or other monies. *Kato* is distinguishable on much the same basis. *See* 878 F.2d at 269.

# APPENDIX

| Trial No. 1 Count # | Trial No. 1 Exhibit # | Trial No. 2 Exhibit # | Document |
|---|---|---|---|
| 2 | 13 | 32 | 5/22/84 note from Ochs to TPA forwarding Dray's request for retainer and $125/hr fee |
| 3 | 14 | 33 | 5/29/84 bill from Dray to TPA for $1,687.50 relayed by Ochs with note asking for immediate payment |
| 5 | 15 | 34 | 6/11/84 check from TPA in payment of above bill |
| 4 | 16* | 35 | 3/27/85 bill from Dray to TPA for $30,000 |
| | 17 | 36 | 4/8/85 letter from Dray to Ochs explaining $30,000 bill (date-stamped 4/15/85) |
| 6 | 18* | 37 | copy of above letter sent by Ochs to TPA with handwritten explanatory notation |
| | 19 | 38 | 5/23/85 check from TPA to Dray in payment of above bill |

**These documents bore directly upon, but were not specifically pleaded in, the indicated counts.*

UNITED STATED DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action
No. 86-333-MA

UNITED STATES OF AMERICA
*v.*
RICHARD M. DRAY AND
PAUL OCHS, JR.

## MEMORANDUM AND ORDER

MAZZONE, D.J. September 12, 1988

This case is before the Court on defendants' motions: (1) motion to dismiss the indictment for violation of 18 U.S.C. § 3161 (the Speedy Trial Act); and (2) motion in limine as to evidence introduced at the prior trial.

Defendants Richard Dray and Paul Ochs were indicted on October 10, 1986 on six counts: one count of conspiracy to commit mail fraud (18 U.S.C. § 371) and five counts of mail fraud (18 U.S.C. § 1341). At the close of the Government's evidence at trial, the District Court granted defendants' motion for a judgment of acquittal under Rule 29(a), finding insufficient evidence of mailing as to three of the substantive mail fraud counts. The jury then found both defendants guilty on the conspiracy count and not guilty on the two remaining mail fraud counts.

The defendants appealed their conspiracy convictions, contending that the jury had improperly received an "intangible rights" instruction in violation of the Supreme Court ruling in *McNally* v. *United States*, 107 S.Ct. 2875 (1987). On March 15, 1988 the First Circuit reversed the convictions on that basis and remanded the case for a new trial. *United States* v. *Ochs*, 842 F.2d 515 (1st Cir. 1988).

On March 28, 1988 the Government filed and the Court of Appeals allowed, a motion to extend for 30 days the time for filing a petition for rehearing with a suggestion for a rehearing en banc. No such motion was ever filed but on May 9, 1988, the Government filed a motion for reassignment and trial date in the District Court. On June 3, 1988, the mandate from the Court of Appeals was issued. On June 14, 1988, the District Court allowed the Government's motion for reassignment but did not set a trial date until June 17, 1988. At that time, trial was set for September 6, 1988. On August 9, 1988 the defendants filed these motions. I consider them in order.

I.

Defendants move for a dismissal of the indictment with prejudice due to violations of the Speedy Trial Act, 18 U.S.C. § 3161. They contend that the speedy trial clock began running April 5, 1988, which they contend is the date the Court of Appeals should have issued the mandate under Fed.R.App.P. 41(a). Accordingly, they contend that the trial should have commenced on June 14, 1988 and the indictment should now be dismissed. They ask that the dismissal be with prejudice because the offense is serious, the delay is lengthy and the effect of the reprosecution would be burdensome.

The Government argues in response that the speedy trial clock began running on June 3, 1988, the date the Court of Appeals issued the mandate or, at the earliest, May 5, 1988, 7 days after their 30 day leave to file a petition for rehearing expired in the Court of Appeals. As part of their argument they contend that the time while their motion for reassignment and a trial date was pending in this Court should be excluded under § 3161(h)(F). Accordingly, they find that the total time that has elapsed under the Speedy Trial Act is 53 days (counting from June 3) or 57 days (counting from May 5). They also ask that any dismissal be without prejudice because the delay was brief and not the fault of the Government.

I conclude that the time period for purposes of 18 U.S.C. § 3161(e) was tolled on June 3, 1988, the date the mandate issued from the Court of Appeals and the date this Court first gained jurisdiction over this case. Any other interpretation of § 3161(e) would be contrary to its own language which requires that the period run from "the date the action occasioning the retrial *becomes* final." (emphasis added).[1] Nothing in the language of this section suggests that Congress intended that the seventy days should begin when the Court of Appeals should have issued a mandate under Fed.R.App.P.41(a). Moreover, such an interpretation would impose a heavy burden upon this Court; there would be strict time requirements during periods when it is impossible, for want of jurisdiction, to bring a case to trial. Defendants can cite no authority, statutory or otherwise, which supports this reading of § 3161(e). I am mindful that it is immaterial whether the delay occurs in the Court of Appeals or in this Court, but there is simply no provision in the law or case precedent which makes the delay in the Court of Appeals actionable in this way.

Even if the defendants' reading of § 3161(e) is correct, I also agree with the Government that the date the mandate *should* have issued is May 5, 1988 not April 5, 1988. I reach this conclusion by adopting the Government's reading of Fed.R.App. P. 41(a) and 35(c). Their motion for a 30 day leave to file a petition for rehearing with a suggestion for rehearing en banc stayed the issuance of the mandate in the same way that an actual petition would have. It would be senseless for the mandate to have issued during this leave because if the Government had decided to file a petition, the Court of Appeals would no longer have had jurisdiction over the case. After that leave expired on April 28, 1988 the Court of Appeals had 7

[1] It is well established the date the mandate shall issue is the date the action becomes "final" for purposes of this section. *United States* v. *Rush*, 738 F.2d 497, 509 (1st Cir. 1984); *United States* v. *Mack*, 669 F.2d 28, 33 (1st Cir. 1982).

days to issue the mandate just as if, under Fed.R.App.P. 41(a), the petition had been denied (see Government's Opposition Brief p. 11).

The speedy trial clock then ran from May 5, 1988 until May 9, 1988 when the Government filed their motion for reassignment and for a trial date. Although this is a routine motion, it qualifies as a proper pre-trial motion and therefore gives rise to excludable time under § 3161(h)(F). *Henderson* v. *United States*, 476 U.S. 321 (1986). Judge Woodlock granted that motion on June 13, 1988 although a trial date was not set until this Court did so on June 17, 1988. Under either date, the total time limit under § 3161(e) was not exceeded; the defendants filed these motions on August 9 resulting in a total accumulation of 57 days (using June 13) or 61 days (using June 17). These time periods are well within the 70 day limit.

Whether time is measured from the date the mandate issued (resulting in a total of 53 days) or from the date it should have issued (as discussed above), the time before trial has not exceeded the 70 day limit. Accordingly, defendants' motion to dismiss the indictment with prejudice is denied.

II.

The defendants have also moved to exclude certain exhibits and evidence used in the prior trial, asserting that the introduction of this evidence at the new trial would violate their Fifth Amendment guarantee against double jeopardy. The defendants' position may be summarized concisely: the Government, having failed to prove in the first trial that the mails were used in connection with the scheme to defraud on the substantive mail fraud counts may not be allowed to use the same evidence and exhibits to show, in the single surviving conspiracy prosecution, that the use of the mails was reasonably foreseeable.

The defendants' position raises several questions. First, as to Counts 4 and 6, there is no clear indication of the basis of the

jury's verdict. Under *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), this Court is required to "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter" for the purpose of concluding "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Considering the whole record, including the conspiracy conviction, it is possible to conclude that the jury found that the documents were not mailed but it is also possible that they found that the documents *were mailed*, but not mailed in furtherance of the scheme. This is not, in the words of *Ashe*, a "hypertechnical" possibility; by the time the last two documents were delivered, the scheme was essentially complete. (See Government's Opposition Brief at p. 8). Where it is impossible to ascertain the factual conclusions underlying a jury verdict, that verdict should not be used as the basis for issue preclusion in a subsequent prosecution. *Benson* v. *Superior Court*, 507 F.Supp. 975, 978 (D.Mass. 1981), *aff'd*, 663 F.2d 355, 360 (1st Cir. 1981); *United States* v. *Hill*, 550 F.Supp. 983, 988 (E.D. Pa. 1983).

The second problem with the defendant's position lies in the important distinction between the required elements of the substantive offense of mail fraud as opposed to those of a conspiracy to commit mail fraud. While both offenses have a substantial overlap, there is at least one important distinction between the two. In order to prove a conspiracy to commit mail fraud, the government must prove that the defendant agreed to participate in a scheme to defraud in which the use of the mails was either specifically intended or reasonably foreseeable. *United States* v. *Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States* v. *Reed*, 721 F.2d 1059, 1061 (6th Cir. 1983); *United States* v. *Shelton*, 669 F.2d 446, 451 (7th Cir. 1982), *cert. denied*, 456 U.S. 934 (1982). In contrast to the substantive offense, however, the government need not prove that anything was ever mailed. *Blue* v. *United States*, 138 F.2d 351, 360 (6th Cir. 1943). This distinction goes to the heart of

the separate offense of conspiracy; the crime in a conspiracy is the *agreement* to scheme and no actual mailing need have occurred. Still, the prosecution must prove beyond a reasonable doubt that the use of the mails was reasonably foreseeable as part of the conspiracy. Reasonable foreseeability encompasses expectation, usual practice and intent. While proof of mailing would be relevant to this determination, it is not essential to a finding of reasonable foreseeability. The use of the mails could have been reasonably foreseen but never accomplished yet the conspiracy would be complete. On retrial, defendants will be charged solely with the offense of conspiracy to commit mail fraud; neither the government nor the defendants are required to litigate the issue of mailing again. Therefore, there is no need for the application of collateral estoppel.[2]

In addition, the exhibits and evidence which the defendants seek to exclude on the issue of reasonable foreseeability are relevant to other elements in the conspiracy prosecution. Evidence which may be inadmissible for one purpose (i.e. because it is irrelevant due to the foreclosing of an issue through collateral estoppel) still may be admitted for other purposes. *United States* v. *Ranney*, 719 F.2d 1183, 1186-87 (1st Cir. 1983) (statements made by salesmen in a prosecution for investment fraud admissible in a second trial on the issue of the guilt of the principals, even though the salesmen were acquitted); *United States* v. *DeVincent*, 632 F.2d 147, 154 (1st

[2] In line with this reasoning, I disagree with the defendants' contention, both in their oral argument and in their post-hearing memorandum, that because Judge Woodlock's instruction to the jury on the *substantive* counts included the specific intent/reasonable foreseeability element (App. Vol. IV, 210-11) that the jury also decided that the use of the mails was not reasonably foreseeable. Even if we assume that the jury decided a mailing did not occur, it is still likely, given the conspiracy conviction, that they found that there *was* a reasonable foreseeability. This supports my conclusion that they are two separate, albeit related, issues. The Court's acquittal was based on a finding of insufficient evidence of actual mailing. This is separate and distinct from whether the use of the mails was reasonably foreseeable in the scheme to defraud.

Cir. 1980) (evidence of a beating admissible in subsequent prosecution when offered for a different purpose); *United States* v. *Riley*, 684 F.2d 542, 546 (8th Cir. 1982) (evidence of defendant's activities on a certain night admissible in subsequent prosecution when offered to show intent, rather than prove occurrence of crime on that night). The exhibits and evidence at issue here are relevant to show the existence of a scheme and agreement to defraud between the defendants. In contrast to the facts in *United States* v. *Mespoulede*, 597 F.2d 329, upon which the defendants heavily rely, the defendants here will not be forced to overcome factual allegations they overcame in the first trial; mailing is not essential to either of those elements or to the element of reasonable foreseeability. It may be true that some of the same evidence will have to be presented as in the first trial but collateral estoppel does not apply just to relieve defendants from having to present the same evidence twice; at best it would only apply to relieve them from relitigating the issue of mailing twice, which they will not be required to do.

Accordingly, for the reasons stated above, I deny defendants' motion in limine to exclude exhibits and evidence used in the prior trial.

SO ORDERED.

s/ A. DAVID MAZZONE
*United States District Judge*

UNITED STATED DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.
Cr. 86-333-WD
VIOLATIONS:
18 U.S.C. §371-
Conspiracy
18 U.S.C. §1341-
Mail Fraud

UNITED STATES OF AMERICA
*v.*
RICHARD M. DRAY AND
PAUL OCHS, JR.

## INDICTMENT*

THE GRAND JURY CHARGES THAT:

**General Allegations**

At all times material to the indictment unless otherwise alleged:

1. The defendant, RICHARD DRAY, was an attorney who resided at 233 Adams Street, Milton, MA, and who had a law office at One Court Street, Boston, Massachusetts.

2. At all times material to this indictment, the defendant, PAUL OCHS, JR., resided at 1150 Canton Avenue, Milton, Massachusetts, and was one of two partners who owned the Stanhope Development Company, a company doing business in Boston, Massachusetts.

3. Temple Place Associates was a Massachusetts partnership which owned and was renovating a commercial building located in Boston at 477-481 Washington Street, also known as 60 Temple Place.

*Redacted for second trial by removal of underlined portions, that being subparagraphs 14(b), 21(b) and 21(e), and paragraphs 22, 23(a) and 23(b).

4. The general partner of Temple Place Associates was Bervest, also a Massachusetts partnership, which was owned by Berwind Realty Services, Inc., a company located in Philadelphia, Pennsylvania.

5. Mirabassi Associates was a Massachusetts company owned by David Mirabassi. Mirabassi Associates was principally engaged in the business of construction management.

6. In 1984, Temple Place Associates contracted with the Stanhope Development Company to oversee the renovation of the 477-481 Washington Street building. Also in 1984, Temple Place Associates contracted with Mirabassi Associates to be the general contractor and construction manager on the 477-481 Washington Street project. One of the project costs which was to be paid to the City of Boston out of the monies which Mirabassi and Associates was to receive from Temple Place Associates, was the building permit fee.

7. In or about May, 1984, on the recommendation of PAUL OCHS, JR., RICHARD DRAY was hired by Temple Place Associates to assist it in filing for and obtaining approval and permits from various agencies of the City of Boston, so that the renovation of 477-481 Washington Street, could proceed expeditiously. One of the permits which DRAY was specifically hired by Temple Place Associates to file for, was the building permit.

8. Building permits to do construction or renovation work in the City of Boston must be obtained from the Department of Inspectional Services.

9. In 1984, the fee charged by the City of Boston for the issuance of a building permit was based on the estimated cost of the construction. The individual or company applying for the permit was required, as part of the application, to estimate the cost of construction. This cost estimate was then reviewed by a senior official of the Department of Inspectional Services, and once approved, formed the basis upon which the permit fee was established. In 1984, the permit fee was $700 for the first $100,00 of construction, plus an additional $10 for each additional $1000 of construction.

10. On or about May 24, 1984, RICHARD DRAY filed a building permit application for the proposed renovation at 477-481 Washington Street. The estimated cost of construction which should have been included on that application was at least $2.4 million. The estimated cost which was in fact included on that building permit application was $1.2 million.

**COUNT ONE:** 18 U.S.C. §371 — Conspiracy

A. *The Conspiracy*

11. The allegations of Paragraphs 1-10 of this Indictment are hereby realleged and incorporated herein.

12. From in or about May of 1984, through in or about a date unknown to the Grand Jury, but at least through May of 1985, in the District of Massachusetts, the defendants,

RICHARD DRAY and

PAUL OCHS, JR.

and other persons known and unknown to the Grand Jury, knowingly, willfully and unlawfully combined, conspired, and agreed with each other to commit an offense against the United States, that is, they conspired to use the United States mails infurtherance of a scheme to defraud the City of Boston and its citizens, to obtain money by means of false and fraudulent pretenses, and to conceal material facts, in violation of Title 18, United States Code, Section 1341.

B. *Method and Means of the Conspiracy*

13. The object of the foregoing conspiracy was to obtain money for the defendants DRAY and OCHS, which was not due them.

14. In seeking to accomplish this object, the defendants DRAY and OCHS defrauded:

(a) The City of Boston and its citizens of approximately $12,000 in additional permit fees which should have been paid the City in connection with the issuance of the building permit for the 477-481 Washington Street project;

(b) The City of Boston and its citizens of their right to have the affairs of the City conducted honestly, impartially, and free from corruption, fraud, and undue favoritism; and

(c) The firms of Mirabassi and Associates and Temple Place Associates who were double billed for the same purported legal services performed by DRAY in connection with his filing of the building permit application for the 477-481 Washington Street project.

15. The method and means employed by the defendants DRAY and OCHS to execute the aforesaid scheme and conspiracy included, but were not limited to, those set out in paragraphs 16-20, below.

16. It was part of the scheme and conspiracy that RICHARD DRAY would file a building permit for the 477-481 Washington Street project which falsely and fraudulently understated the cost of the construction work to be performed, thereby lowering the permit fee due the City of Boston by approximately $12,000, and depriving the City of Boston of the full amount of the fee it was due.

17. It was further part of the scheme and conspiracy that PAUL OCHS, JR. would and did request that Temple Place Associates pay RICHARD DRAY $125 per hour for his services in connection with filing the application for the aforementioned building permit.

18. It was further part of the conspiracy that PAUL OCHS, unbeknownst to Temple Place Associates, would and did request that Mirabassi Associates pay RICHARD DRAY a $5,975 fee for filing the aforesaid building permit application.

19. It was further part of the conspiracy that PAUL OCHS and RICHARD DRAY would share the $5,975 fee obtained from Mirabassi Associates.

20. It was further part of the conspiracy that RICHARD DRAY would make a cash payoff to an employee of the City of Boston, Department of Inspectional Services, in order to obtain his approval of the false and fraudulent

estimated construction cost figures which were included on the building permit application for the 477-481 Washington Street project.

C. *Overt Acts*

21. In furtherance of the conspiracy, and to effect the objects thereof, the defendants OCHS and DRAY committed the following overt acts in the District of Massachusetts:

(a) On or about May 18, 1984, PAUL OCHS, JR., met with J. Williston Smith, an employee of Berwind Realty Services, Inc., and others.

(b) On or about May 22, 1984, PAUL OCHS, JR., mailed a letter to Williston Smith in Philadelphia, relating to the hiring of RICHARD DRAY by Temple Place Associates to work on the 477-481 Washington Street project.

(c) On or before May 24, 1984, RICHARD DRAY met with an employee of the City of Boston Department of Inspectional Services.

(d) On or about May 24, 1984, RICHARD DRAY filed a building permit application to do renovation work at 477-481 Washington Street, with the Department of Inspectional Services.

(e) On or about May 29, 1984, PAUL OCHS, JR., mailed a copy of DRAY's bill, (in the amount of $1,687.50), for services rendered including the filing of the building permit application, to Williston Smith, in Philadelphia.

(f) On or about May 29, 1984, PAUL OCHS, JR., handed David Mirabassi a bill from RICHARD DRAY in the amount of $5,975, which was purportedly for filing the building permit application.

(g) On a date unknown to the Grand Jury, but subsequent to May 24, 1984, RICHARD DRAY met with an employee of the Department of Inspectional Services and handed him an envelope of cash.

All in violation of United States Code, title 18, Section 371.

**COUNTS TWO THROUGH SIX:** 18 U.S.C. §1341 — Mail Fraud

22. Paragraphs 1-11 and 14-21 of this indictment are hereby incorporated by reference and alleged herein.

23. On or about the dates set forth below, in the District of Massachusetts the defendants,

RICHARD DRAY and
PAUL OCHS, JR.,

having knowingly and willfully devised a scheme to defraud the City of Boston and its citizens, of permit fees and of the honest and faithful services of its employees, to which they were entitled, and to defraud the Mirabassi and Associates and Temple Place Associates companies of certain purported legal fees, for the purpose of executing the aforesaid scheme:

(a) Knowingly caused the items listed below to be placed in authorized depositories for mail matter in Massachusetts, to be sent and delivered by the United States Postal Service:

| *Count* | *Date* | *Item* | *Mailed From* | *Mailed To* |
|---|---|---|---|---|
| (2) | On or about May 22, 1984 | Letter from PAUL OCHS with attached letter from RICHARD DRAY | Boston, MA | Williston Smith Philadelphia, PA |
| *Count* | *Date* | *Item* | *Mailed From* | *Mailed To* |
| (3) | *In or about* June, 1984 | DRAY's bill for services dated May 29, 1984 | Boston, MA | Williston Smith Philadelphia, PA |
| (4) | On or about April 8, 1985 | Letter from DRAY to OCHS | Boston, MA | Williston Smith Philadelphia, PA |

(b) Received from and knowingly caused the items listed below to be delivered by, the United States Postal Service:

| *Count* | *Date* | *Item* | *Mailed From* | *Mailed To* |
|---|---|---|---|---|
| (5) | On or about June 11, 1984 | Check for $1,687.50 | Philadelphia, PA | Boston, MA |
| (6) | On or about May 23, 1985 | Check for $30,000 | Philadelphia, PA | Boston, MA |

All in violation of United States Code, Title 18, Sections 1341 and 2.

A TRUE BILL

s/ CATHERINE MCCARTHY
*Foreman of the Grand Jury*

s/ ROBERT J. CORDY
*Assistant United States Attorney*

DISTRICT OF MASSACHUSETTS: October 10, 1986 @ 11:50 A.M. Returned into the District Court by the Grand Jurors and filed.

s/ JUDI M. SANZO
*Deputy Clerk*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Criminal No. 86-333-Ma.

UNITED STATES OF AMERICA
*v.*
RICHARD M. DRAY AND
PAUL OCHS, JR.

## DEFENDANT RICHARD M. DRAY'S REQUEST FOR LIMITING INSTRUCTIONS

This Court is respectfully requested to give the limiting instruction which follows, if certain documents are admitted in evidence. The documents are hereinafter listed:

1. Note date-stamped May 25, 1984 enclosing letter dated May 22, 1984 to Mr. Ochs from Mr. Dray.
2. Bill dated May 29, 1984 from Mr. Dray to Mr. Ochs with note from "Paul" to "Will".
3. Letter dated April 8, 1985 from Mr. Dray to Stanhope Development Corporation.
4. Check for $1,687.50 dated June 11, 1984 to DiCarlo, Dray & Walsh from Temple Place Associates.
5. Check for $30,000 to DiCarlo, Dray & Walsh dated May 23, 1985 from Temple Place Associates.

a. This document was alleged in a prior proceeding to have been mailed in violation of 18 U.S.C. § 1341, the mail fraud statute. Each defendant was acquitted of such violation.

b. I have admitted this document in evidence only for your consideration on the issue as to whether or not the defendants agreed to devise or attempt to devise a scheme or artifice to defraud and for no other purpose.

c. You may not consider this document on the issue of whether in fact the mails were used in any way to carry out the alleged scheme.

d. You may not consider this document on the issue of whether it was reasonably foreseeable by either defendant that the mails would be used for the purpose of executing an alleged scheme to defraud.

e. You are instructed that this document was not placed in the mail, taken or received therefrom, or caused to be delivered by mail by anyone.

If all or part of the foregoing limiting instruction is not given, the Court is respectfully requested to instruct at the time such document is admitted in evidence:

1. This document has been admitted in evidence for the purpose of showing reasonable foreseeability by either or both defendants that it would be mailed. I will instruct you further at the close of the case, but I instruct you now that the Government has the burden of proving beyond a reasonable doubt that each defendant agreed to engage in a scheme to defraud in which each contemplated that it was likely that the mails would be used to transmit this document. *United States* v. *Massey*, 827 F.2d 995, 1002 (5th Cir., 1987).

2. It is for you the jury to determine at the close of this case whether each defendant contemplated that the mails would likely be used to transmit this document. You may consider, in making that determination, whether you find by a preponderance of the evidence that the mails were in fact used to transmit this document. Keep an open mind, both to the Government and to the defendants, and I will instruct you as

to what is meant by a preponderance of the evidence at the close of the case.

Respectfully submitted,
RICHARD M. DRAY,
By his attorney,

Dated:
September 20, 1988

s/ WILLIAM P. HOMANS, JR.

WILLIAM P. HOMANS, JR.
HOMANS, HAMILTON, DAHMEN
& MARSHALL
One Court Street
Boston, MA 02108
(617) 523-3716

[9-20] The crime of conspiracy to violate federal law is a separate crime. It is a separate and distinct crime from the actual violation of the law, such as mail fraud. Indeed, if mail fraud were charged here — and it is not, I remind you — you could find the defendant guilty of the crime of conspiracy to commit mail fraud even though the mail fraud which was the objective of the conspiracy was not actually committed or succeeded. The conspiracy is a separate offense from the mail fraud itself. The government here does not have to prove that the defendant is guilty of the conspiracy to commit mail fraud.

In order to commit either mail fraud or conspiracy to commit mail fraud, a defendant must specifically intend that a mailing in furtherance of the scheme should occur, or it must be reasonably foreseeable to the defendant that such a mailing might occur. In order to prove mail fraud, the government must go further and prove that a mailing actually occurred. But it is not necessary to prove an actual mailing in order to prove a conspiracy. And it is conspiracy with which the defendants are charged here.

Now, finally, I will turn to the conspiracy, the only charge in this indictment.

Supreme Court, U.S.
FILED
SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-84

# In the Supreme Court of the United States

OCTOBER TERM, 1990

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RICHARD M. DRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH W. STARR
*Solicitor General*
ROBERT S. MUELLER, III
*Acting Assistant Attorney General*
JOSEPH C. WYDERKO
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether petitioner's acquittals during a prior trial on counts charging him with mail fraud collaterally estopped the government from introducing evidence relating to those counts during petitioner's retrial on a count charging him with conspiracy to commit mail fraud.

2. Whether petitioner was entitled to a jury instruction limiting the purposes for which that evidence could be considered.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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No. 90-54

RICHARD M. DRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 901 F.2d 1132. The opinion of the district court (Pet. App. 21a-27a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 28, 1990. A petition for rehearing was denied on April 20, 1990. See 901 F.2d 1132.[1] The petition for a writ of certiorari was filed on June 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The government sought rehearing. The reported version of the court of appeals' decision includes an opinion, issued on April 20, 1990, denying the government's petition for rehearing. 901 F.2d at 1143.

## STATEMENT

1. Petitioner has been tried twice. The evidence at the second trial, which was substantially the same as that introduced during the first trial, is summarized in the opinion of the court of appeals. Pet. App. 2a-4a, 6a. It showed that petitioner, a Boston attorney, conspired with co-defendant Paul Ochs, Jr., to reduce the fee for a construction permit for the renovation of a building in Boston by understating the cost of the project and bribing a public official to approve the fraudulent cost estimate. The owner of the building was Temple Place Associates (TPA), a Philadelphia-based limited partnership. TPA hired Ochs' firm, Stanhope Development Company, to oversee the renovation; one of Stanhope's duties was to assist in obtaining the necessary permits. The general contractor for the project, Mirabassi Associates, Inc., was obligated to pay the fees for the permits. At Ochs' urging, TPA hired petitioner to handle the legal matters associated with obtaining the permits. Pet. App. 2a-3a.

During the relevant period in Boston, the fee for a construction permit was based upon the estimated cost of the work. An application for a permit had to contain an estimated cost of construction; the City's Department of Inspectional Services would review the estimate to determine whether it was reasonable. *United States* v. *Ochs*, 842 F.2d 515, 517 (1st Cir. 1988). Petitioner and Ochs arranged to bribe Douglas Robinson, the chief building inspector in the Department (whom petitioner had known for 15 years), to obtain Robinson's approval of a fraudulent application understating the cost of their renovation. In May 1984, petitioner met with Robinson. They discussed "lowballing"—*i.e.*, lowering the estimated cost of the project—and then splitting the amount that could be saved in permit fees. Pet. App. 3a.

In the meantime, Mirabassi had estimated the cost of the renovation to be $2,425,000, which would have required a permit fee of $23,950. Petitioner informed Mirabassi that its estimated cost was too high, and he directed Mirabassi to prepare a new application for the construction permit showing an estimated cost of $1,200,000. After Ochs signed the application, petitioner delivered it to Robinson, who processed and approved it. As a result of the fraudulent estimate of the cost of construction, Mirabassi paid a permit fee that was $12,200 lower than it would have been under the original cost estimate. Pet. App. 3a.

To recapture some of the savings on the permit fee, petitioner billed TPA $1,687.50 for conferring with Ochs and preparing and filing the permit application. Ochs transmitted the bill to TPA, which paid it. The next day, petitioner also billed Mirabassi $5,975 for preparing and filing the permit application. Ochs hand-delivered the bill and directed Mirabassi to pay it. Although Mirabassi had not retained petitioner and was not contractually bound to pay him, it made the requested payment. Shortly thereafter, petitioner wrote a check to Ochs for $3,000 and gave Robinson $400 in cash. Pet. App. 3a-4a.

Nearly a year later, petitioner sent another bill to TPA for $30,000; the invoice again included charges for his services in obtaining the construction permit. When Ochs protested on behalf of TPA that the charges were inordinate, petitioner wrote back to Ochs, reminding Ochs of the importance to the project of petitioner's political connections. Ochs then persuaded TPA to pay the full $30,000. Pet. App. 4a.

2. Petitioner was indicted in the District of Massachusetts and charged with five counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. At

petitioner's first trial, the government introduced seven documents to prove the mailings required for convictions on the substantive mail fraud offenses charged in Counts 2-6 of the indictment.[2] The prosecutor also introduced evidence that the contracting parties frequently used the mails to transmit documents between Boston and Philadelphia. A TPA employee testified that it was the customary practice of TPA and Mirabassi to send written materials back and forth by either mail or Federal Express, depending on time constraints, but he could not recall the specific manner in which each of the seven documents underlying Counts 2-6 were transmitted. To establish mail fraud, it was necessary to prove that the documents had travelled through the mails, rather than by Federal Express. The government relied upon the dates on which documents were sent and received to demonstrate that the mails were used. Pet. App. 4a-5a.

At the close of the government's case in chief, the district court entered judgments of acquittal on three of the substantive mail fraud counts, Counts 2, 3, and 5. Although it acknowledged the possibility that the mails were used to transmit the three documents underlying those counts, the court concluded that there was insufficient evidence for a jury to find beyond a reasonable doubt that the documents had been mailed. The jury subsequently acquitted petitioner and Ochs of the two remaining substantive mail fraud offenses charged in Counts 4 and 6. The jury found petitioner and Ochs guilty of conspiracy to commit mail fraud (Count 1). Pet. App. 5a.

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[2] In a table appended to the court of appeals' opinion, the court provided the exhibit numbers of the documents, showed the counts to which they related, and briefly summarized their contents. Pet. App. 20a.

3. While petitioner's appeal was pending, this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. In light of *McNally*, the court of appeals vacated petitioner's conspiracy conviction and remanded the case for a new trial. *United States* v. *Ochs*, *supra*. On remand to the district court, petitioner filed a motion in limine in which he claimed that the doctrine of collateral estoppel barred the introduction of the seven documents on which the substantive mail fraud counts had been based as well as any evidence that those documents had been mailed. The district court denied the motion. Pet. App. 21a-27a.

The district court concluded that the jury's acquittals on Counts 4 and 6 did not bar the introduction of the documents underlying those counts because "there is no clear indication of the basis of the jury's verdict." Pet. App. 24a-25a. Further, noting that the government would not have to prove that the documents had actually been mailed in order to obtain a conspiracy conviction, the court concluded that the documents involved in all of the substantive counts could be introduced to show that it was reasonably foreseeable that the mails would be used to advance the conspiracy, as well as to establish other elements of the conspiracy offense, such as the existence of a scheme and agreement to defraud. *Id.* at 26a-27a.

After the court denied the motion in limine, petitioner requested limiting instructions with respect to five of the seven documents underlying Counts 2-6. Pet. App. 35a-37a. Petitioner asked that the jury be instructed, in the alternative, (a) that the documents were to be considered only on the issue of whether a conspiracy existed and not on the issue of whether it was reasonably foreseeable that the mails would be used as part of the conspiracy, or (b)

that the documents had been introduced for the purpose of showing that it was reasonably foreseeable that the mails would be used as part of the conspiracy. The district court did not give either instruction. Pet. App. 6a, 16a.

At the conclusion of the second trial, petitioner was again convicted on the conspiracy count. The court sentenced him to one year's imprisonment, with all but the first six months suspended in favor of two years' probation. As a condition of probation, the district court ordered petitioner to perform 500 hours of community service.

4. The court of appeals affirmed. Pet. App. 1a-20a. With respect to petitioner's collateral estoppel claim, the court of appeals noted that the district court's acquittals on Counts 2, 3 and 5 determined in petitioner's favor the issue whether the three documents underlying those counts had actually been mailed, but it held that this determination did not estop the government from offering those documents to show that a conspiracy existed and that the use of the mails was reasonably foreseeable. *Id.* at 10a, 12a.

For similar reasons, the court of appeals also concluded that the jury's acquittals on Counts 4 and 6 did not bar the introduction of the documents on which those counts were based. Pet. App. 12a-15a. The court rejected petitioner's contention that the jury's acquittals on Counts 4 and 6 necessarily determined that no fraudulent scheme existed, that petitioner was not a willful participant in the scheme, or that the use of the mails was not reasonably foreseeable. Because petitioner was convicted of conspiracy, the court reasoned, "it seems highly probable, if not ineluctable, that the original jury found insufficient evidence that the exhibits in question were actually mailed, but sufficient evidence that mailing was contemplated." *Id.* at 13a. The court concluded that petitioner had not sustained

his burden of showing that the documents were used during the retrial to prove an issue resolved in his favor by his prior acquittals. *Id.* at 13a-15a.

The court of appeals also held that the district court did not abuse its discretion in refusing to give petitioner's proposed jury instructions. Pet. App. 16a-17a. It concluded that "restriction of the evidence by informing the jurors that they could not consider the exhibits as proof of actual mailing would have been redundant," since the district court "told the jury, in so many words, that mailing was *not* the issue" during its jury charge. *Id.* at 16a. The court added that "it was unnecessary—and would have been confusing—to tell the jury not to consider the documents on that (non)issue." *Id.* at 17a. The court also noted that "there was no reason to restrict the admission of the documents solely to the issue of reasonable foreseeability" because "they were also relevant to the existence of the conspiracy charged in the indictment." *Ibid.*

## ARGUMENT

1. Petitioner contends that the acquittals on the substantive mail fraud counts at his first trial collaterally estopped the government from offering the documents on which those counts were based into evidence during his retrial on the conspiracy count. Pet. 16-22.

As the court of appeals recognized, the doctrine of collateral estoppel prohibits relitigation only of those issues that have actually been decided in a party's favor. *Dowling* v. *United States*, 110 S. Ct. 668, 673 (1990). In determining whether collateral estoppel applies, the court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that

which the defendant seeks to foreclose from consideration' " during the second trial. *Ashe* v. *Swenson,* 397 U.S. 436, 444 (1970). The burden is on the defendant to show that the verdict in the prior trial necessarily decided the issue raised in the second trial. See *Dowling* v. *United States,* 110 S. Ct. at 673.

At petitioner's first trial, the district court made clear that its judgments of acquittal on Counts 2, 3, and 5 were based on the absence of proof demonstrating beyond a reasonable doubt that the documents involved in those counts had actually been mailed. As the court of appeals noted, the most plausible explanation of the jury's not guilty verdicts on Counts 4 and 6 was that it had reached the same conclusion with respect to the documents involved in those counts. At most, therefore, the government was foreclosed from relitigating the issue of whether any of the documents in question was actually mailed.[3]

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[3] Relying on an excerpt from the jury instructions at his first trial, petitioner suggests that the jury must have found in that trial that the use of the mails was not reasonably foreseeable. Pet. 20-22. In that instruction, the court advised the jury that it was necessary for a conviction on a substantive mail fraud count that a defendant specifically intend to use the mails and that, *to establish intent,* it was sufficient to demonstrate that it was reasonably foreseeable to a defendant that his actions would cause others to use the mails. For the reasons stated in the court of appeals' opinion, there is no reason to believe that the acquittals on Counts 4 and 6 were based on a failure of proof on the issue of intent, rather than a failure to use the mails, the *actus reus* of the offense. Pet. App. 14a-15a. Moreover, at most, petitioner's argument suggests that the verdict does not disclose on its face whether the acquittals on Counts 4 and 6 were based on a jury determination that the government failed sufficiently to prove that the documents involved were actually mailed, that petitioner and his co-defendant lacked the requisite intent to use the mails to transmit the documents, or both. In that situation, collateral estoppel would not foreclose relitigation of any issue.

During petitioner's second trial, the documents were admitted to prove different issues. As the court of appeals noted, the documents were relevant to show that petitioner and Ochs had conspired with one another and that they either intended or reasonably foresaw that the mails would be used to further their scheme to defraud. See, *e.g.*, *United States* v. *Citron*, 853 F.2d 1055, 1058-1059 (2d Cir. 1988); *United States* v. *Price*, 750 F.2d 363, 366 (5th Cir.), cert. denied, 473 U.S. 904 (1985). Petitioner has not sustained his burden of showing that the documents were offered in the second trial to prove an issue that was resolved in his favor in the first trial.[4]

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[4] There are two additional reasons, not addressed in the court of appeals' opinion, why collateral estoppel did not foreclose the admission of the documents in question. First, even if the documents had been offered to demonstrate that they were actually mailed, they were not introduced to prove that proposition beyond a reasonable doubt. The jury was instructed that the ultimate issue was whether petitioner and Ochs had entered a conspiracy with respect to which the use of the mails was reasonably foreseeable (see Pet. App. 16a-17a), and this was the question to which the reasonable doubt standard applied. The government was not called upon to demonstrate beyond a reasonable doubt that the documents were actually mailed. Thus, under *Dowling* v. *United States*, 110 S. Ct. at 671-673, the jury could properly have considered whether the documents were actually mailed in the course of determining whether the government had carried its burden of demonstrating beyond a reasonable doubt that the use of the mails was reasonably foreseeable.

Second, this Court noted in *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), that, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." See also *United States* v. *Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988), cert. denied, 109 S. Ct. 1932 (1989). Here, the government made no attempt to pursue successive prosecutions; the retrial resulted from a reversal on appeal sought by petitioner. Accordingly, the doctrine of collateral estoppel should not foreclose the government from establishing facts in the retrial even if the partial

2. The district court did not err in refusing to deliver petitioner's proposed limiting instructions. See Pet. 22-26.

First, neither of the alternatives proposed by petitioner was a correct statement of applicable law. The first alternative would have permitted the jury to consider the documents only on the issue of whether petitioner and his co-defendant had agreed to devise a scheme to defraud and would have prohibited the jury from relying on them in determining whether it was reasonably foreseeable that the mails would be used to further such a conspiracy. The second alternative would have effectively advised the jury that the documents had been admitted only for the purpose of showing reasonable foreseeability. As we have shown, however, the jury was entitled to consider the documents on both the question whether petitioner and the co-defendant had conspired with one another and the question whether the use of the mails was reasonably foreseeable. See Pet. App. 35a-37a. Consequently, both of petitioner's proposed instructions would have improperly limited the jury's consideration of the documents.

Second, in view of other instructions limiting the issues in the case, an instruction limiting the use of the documents was unnecessary and would have been confusing. It is well established that jury instructions are viewed as whole. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Here, the district court "painstakingly" explained the difference between substantive mail fraud and a conspiracy to commit mail fraud and "told the jury, in so many words, that mailing was *not* the issue" during its jury charge. Pet. App. 16a. Thus, as the court of appeals noted, it would have been confusing to instruct the jury not to consider the documents to resolve a matter that

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verdict at the first trial could confidently be said to represent a finding against the government on those facts.

was not at issue. *Id.* at 17a. The district court's jury charge effectively guided the jury's consideration of all of the evidence introduced at trial, including the documents at issue. In light of the court's careful definition of the ultimate issue in the case, Fed. R. Evid. 105 did not require a separate limiting instruction on those documents.[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

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[5] Since petitioner's conspiracy conviction at the first trial was reversed on grounds other than the insufficiency of the evidence, the Double Jeopardy Clause did not bar the retrial. See, *e.g.*, *Montana* v. *Hall*, 481 U.S. 400 (1987); *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978). There is no merit to petitioner's suggestion (Pet. 18, 20) that this Court's recent decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), may apply to this case. *Grady* applies only when the government initiates multiple prosecutions for a single offense. It has no application to a retrial required in the course of a single prosecution.

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